UNITED STATES REPORTS

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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1979

APRIL 21 THROUGH JUNE 5, 1980

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.

OFFICERS OF THE COURT

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WADE H. McCREE, Jr., Solicitor General.
MICHAEL RODAK, Jr., Clerk.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

CURTISS-WRIGHT CORP. *v.* GENERAL ELECTRIC CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 79–105. Argued January 14, 1980—Decided April 22, 1980

Petitioner brought a diversity action in Federal District Court against respondent, seeking damages and reformation with regard to a certain series of contracts between the parties. Various claims were asserted, including a $19 million claim for amounts due on the contracts already performed. Respondent filed counterclaims. The facts as to most of the claims and counterclaims are in dispute, but the sole dispute as to petitioner's claim for the $19 million balance due concerns the application of a release clause in each of the contracts. The District Court granted summary judgment for petitioner for $19 million, plus prejudgment interest at the statutory rate of 6%, notwithstanding the release clause. Petitioner then moved for a certification of this judgment as a final judgment under Federal Rule of Civil Procedure 54 (b), which provides that when more than one claim is presented in an action, whether as a claim or counterclaim, a district court may direct the entry of a final judgment as to one or more but fewer than all of the claims upon an express determination that there is no just reason for delay. The court granted the motion and directed entry of final judgment for petitioner after determining that there was "no just reason for delay" and finding, *inter alia*, that certification would not result in unnecessary appellate review; that the claims finally adjudicated were separate from

any of the other claims or counterclaims; that the nature of the claims was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals; that petitioner would suffer severe financial loss from nonpayment of the $19 million judgment because current interest rates were higher than the statutory prejudgment rates; and that the solvency of the parties was not a significant factor since each appeared to be financially sound. Dismissing the case for want of an appealable order, the Court of Appeals held that the District Court had abused its discretion by granting the Rule 54 (b) certification, since the possibility of a setoff required that the status quo be maintained unless petitioner could show harsh or unusual circumstances and since no such showing had been made.

Held: The District Court did not abuse its discretion in granting petitioner's motion for certification under Rule 54 (b). Pp. 7–13.

(a) In deciding whether there are just reasons to delay an appeal of individual final judgments in a setting such as this, a district court must take into account the interests of sound judicial administration as well as the equities involved. Hence, it was proper for the District Court here to consider such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals. The mere presence of nonfrivolous counterclaims does not render a Rule 54 (b) certification inappropriate. Pp. 8–9.

(b) The Court of Appeals' holding that the status quo had to be maintained absent a showing by petitioner of harsh or unusual circumstances reflects a misinterpretation of the standard of review for Rule 54 (b) certifications and a misperception of the appellate function in such cases. Pp. 9–10.

(c) The proper standard against which a district court's exercise of discretion in granting a Rule 54 (b) certification is to be judged is the interest of sound judicial administration. Under this standard, although the court of appeals must scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals, once such juridical concerns have been met, the district court's discretionary judgment should be given substantial deference, and the court of appeals should disturb the district court's assessment of the equities only if it can say that the district judge's conclusion was clearly unreasonable. Pp. 10–11.

(d) The question before the District Court here came down to which of the parties should get the benefit of the difference between the pre-

judgment and market rates of interest on the debts admittedly owing and adjudged to be due while unrelated claims were litigated. While the possibility of a setoff against the amount respondent owed petitioner was not an insignificant factor, the District Court took this into account when it determined that both litigants appeared to be financially sound, and that petitioner would be able to satisfy a judgment on the counterclaims if any were entered. Pp. 11–12.

597 F. 2d 35, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Ralph N. Del Deo argued the cause for petitioner. With him on the briefs were *Richard S. Zackin, David Lasky,* and *Alfred J. Kovell.*

Isaac N. Groner argued the cause for respondent. With him on the brief were *Walter H. Fleischer, Alfred F. Belcuore,* and *Albert G. Besser.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Federal Rule of Civil Procedure 54 (b) allows a district court dealing with multiple claims or multiple parties to direct the entry of final judgment as to fewer than all of the claims or parties; to do so, the court must make an express determination that there is no just reason for delay. We granted certiorari in order to examine the use of this procedural device. 444 U. S. 823 (1979).

I

From 1968 to 1972, respondent General Electric Co. entered into a series of 21 contracts with petitioner Curtiss-Wright Corp. for the manufacture of components designed for use in nuclear powered naval vessels. These contracts had a total value of $215 million.

In 1976, Curtiss-Wright brought a diversity action in the United States District Court for the District of New Jersey, seeking damages and reformation with regard to the 21 contracts. The complaint asserted claims based on alleged fraud,

misrepresentation, and breach of contract by General Electric. It also sought $19 million from General Electric on the outstanding balance due on the contracts already performed.

General Electric counterclaimed for $1.9 million in costs allegedly incurred as the result of "extraordinary efforts" provided to Curtiss-Wright during performance of the contracts which enabled Curtiss-Wright to avoid a contract default. General Electric also sought, by way of counterclaim, to recover $52 million by which Curtiss-Wright was allegedly unjustly enriched as a result of these "extraordinary efforts."

The facts underlying most of these claims and counterclaims are in dispute. As to Curtiss-Wright's claims for the $19 million balance due, however, the sole dispute concerns the application of a release clause contained in each of the 21 agreements, which states that "Seller . . . agree[s] as a condition precedent to final payment, that the Buyer and the Government . . . are released from all liabilities, obligations and claims arising under or by virtue of this order." App. 103a. When Curtiss-Wright moved for summary judgment on the balance due, General Electric contended that so long as Curtiss-Wright's other claims remained pending, this provision constituted a bar to recovery of the undisputed balance.

The District Court rejected this contention and granted summary judgment for Curtiss-Wright on this otherwise undisputed claim. Applying New York law by which the parties had agreed to be bound, the District Court held that Curtiss-Wright was entitled to payment of the balance due notwithstanding the release clause. The court also ruled that Curtiss-Wright was entitled to prejudgment interest at the New York statutory rate of 6% per annum.

Curtiss-Wright then moved for a certification of the District Court's orders as final judgments under Federal Rule of Civil Procedure 54 (b),[1] which provides:

"When more than one claim for relief is presented in an

[1] This was the second motion by Curtiss-Wright for Rule 54 (b) cer-

> action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

The court expressly directed entry of final judgment for Curtiss-Wright and made the determination that there was "no just reason for delay" pursuant to Rule 54 (b).

The District Court also provided a written statement of reasons supporting its decision to certify the judgment as final. It acknowledged that Rule 54 (b) certification was not to be granted as a matter of course, and that this remedy should be reserved for the infrequent harsh case because of the overload in appellate courts which would otherwise result from appeals of an interlocutory nature. The essential inquiry was stated to be "whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and justice to the litigants."

The District Court then went on to identify the relevant factors in the case before it. It found that certification would not result in unnecessary appellate review; that the claims

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tification. An earlier motion was denied by the District Court because at that time the matter of prejudgment interest had not yet been resolved.

finally adjudicated were separate, distinct, and independent of any of the other claims or counterclaims involved; that review of these adjudicated claims would not be mooted by any future developments in the case; and that the nature of the claims was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.

Turning to considerations of justice to the litigants, the District Court found that Curtiss-Wright would suffer severe daily financial loss from nonpayment of the $19 million judgment because current interest rates were higher than the statutory prejudgment rate, a situation compounded by the large amount of money involved. The court observed that the complex nature of the remaining claims could, without certification, mean a delay that "would span many months, if not years."

The court found that solvency of the parties was not a significant factor, since each appeared to be financially sound. Although the presence of General Electric's counterclaims and the consequent possibility of a setoff recovery were factors which weighed against certification, the court, in balancing these factors, determined that they were outweighed by the other factors in the case. Accordingly, it granted Rule 54 (b) certification. It also granted General Electric's motion for a stay without bond pending appeal.

A divided panel of the United States Court of Appeals for the Third Circuit held that the case was controlled by its decision in *Allis-Chalmers Corp.* v. *Philadelphia Electric Co.*, 521 F. 2d 360 (1975), where the court had stated:

> "In the absence of unusual or harsh circumstances, we believe that the presence of a counterclaim, which could result in a set-off against any amounts due and owing to the plaintiff, weighs heavily against the grant of 54 (b) certification." *Id.*, at 366 (footnote omitted).

In *Allis-Chalmers*, the court defined unusual or harsh cir-

cumstances as those factors "involving considerations of solvency, economic duress, etc." *Id.*, at 366, n. 14.

In the Third Circuit's view, the question was which of the parties should have the benefit of the amount of the balance due pending final resolution of the litigation. The court held that *Allis-Chalmers* dictated "that the matter remain in status quo when non-frivolous counterclaims are pending, and in the absence of unusual or harsh circumstances." 597 F. 2d 35, 36 (1979) (*per curiam*). The Court of Appeals acknowledged that Curtiss-Wright's inability to have use of the money from the judgment might seem harsh, but noted that the same could be said for General Electric if it were forced to pay Curtiss-Wright now but later prevailed on its counterclaims. *Ibid.*

The Court of Appeals concluded that the District Court had abused its discretion by granting Rule 54 (b) certification in this situation and dismissed the case for want of an appealable order; it also directed the District Court to vacate its Rule 54 (b) determination of finality. Curtiss-Wright's petition for rehearing and suggestion for rehearing en banc were denied. 599 F. 2d 1259 (1979). Four judges dissented from that denial, observing that the case was in conflict with *United Bank of Pueblo* v. *Hartford Accident & Indemnity Co.*, 529 F. 2d 490 (CA10 1976). We reverse.

II

Nearly a quarter of a century ago, in *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427 (1956), this Court outlined the steps to be followed in making determinations under Rule 54 (b). A district court must first determine that it is dealing with a "final judgment." It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." 351 U. S., at 436.

Once having found finality, the district court must go on to determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims. The function of the district court under the Rule is to act as a "dispatcher." *Id.*, at 435. It is left to the sound judicial discretion of the district court to determine the "appropriate time" when each final decision in a multiple claims action is ready for appeal. *Ibid.* This discretion is to be exercised "in the interest of sound judicial administration." *Id.*, at 437.

Thus, in deciding whether there are no just reasons to delay the appeal of individual final judgments in a setting such as this, a district court must take into account judicial administrative interests as well as the equities involved. Consideration of the former is necessary to assure that application of the Rule effectively "preserves the historic federal policy against piecemeal appeals." *Id.*, at 438. It was therefore proper for the District Judge here to consider such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.[2]

Here the District Judge saw no sound reason to delay appellate resolution of the undisputed claims already adjudicated. The contrary conclusion of the Court of Appeals was strongly

[2] We do not suggest that the presence of one of these factors would necessarily mean that Rule 54 (b) certification would be improper. It would, however, require the district court to find a sufficiently important reason for nonetheless granting certification. For example, if the district court concluded that there was a possibility that an appellate court would have to face the same issues on a subsequent appeal, this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims. See *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445, 450, n. 5 (1956).

influenced by the existence of nonfrivolous counterclaims. The mere presence of such claims, however, does not render a Rule 54 (b) certification inappropriate. If it did, Rule 54 (b) would lose much of its utility. In *Cold Metal Process Co.* v. *United Engineering & Foundry Co.*, 351 U. S. 445 (1956), this Court explained that counterclaims, whether compulsory or permissive, present no special problems for Rule 54 (b) determinations; counterclaims are not to be evaluated differently from other claims. 351 U. S., at 452. Like other claims, their significance for Rule 54 (b) purposes turns on their interrelationship with the claims on which certification is sought. Here, the District Judge determined that General Electric's counterclaims were severable from the claims which had been determined in terms of both the factual and the legal issues involved. The Court of Appeals did not conclude otherwise.

What the Court of Appeals found objectionable about the District Judge's exercise of discretion was the assessment of the equities involved. The Court of Appeals concluded that the possibility of a setoff required that the status quo be maintained unless petitioner could show harsh or unusual circumstances; it held that such a showing had not been made in the District Court.

This holding reflects a misinterpretation of the standard of review for Rule 54 (b) certifications and a misperception of the appellate function in such cases. The Court of Appeals relied on a statement of the Advisory Committee on the Rules of Civil Procedure, and its error derives from reading a description in the commentary as a standard of construction. When Rule 54 (b) was amended in 1946, the Notes of the Advisory Committee which accompanied the suggested amendment indicated that the entire lawsuit was generally the appropriate unit for appellate review, "and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule." 28 U. S. C. App., p. 484; 5 F. R. D. 433, 473 (1946).

However accurate it may be as a description of cases qualifying for Rule 54 (b) treatment, the phrase "infrequent harsh case" in isolation is neither workable nor entirely reliable as a benchmark for appellate review. There is no indication it was ever intended by the drafters to function as such.

In *Sears*, the Court stated that the decision to certify was with good reason left to the sound judicial discretion of the district court. At the same time, the Court noted that "[w]ith equally good reason, any *abuse* of that discretion remains reviewable by the Court of Appeals." 351 U. S., at 437 (emphasis added). The Court indicated that the standard against which a district court's exercise of discretion is to be judged is the "interest of sound judicial administration." *Ibid.* Admittedly this presents issues not always easily resolved, but the proper role of the court of appeals is not to reweigh the equities or reassess the facts but to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record.

There are thus two aspects to the proper function of a reviewing court in Rule 54 (b) cases. The court of appeals must, of course, scrutinize the district court's evaluation of such factors as the interrelationship of the claims so as to prevent piecemeal appeals in cases which should be reviewed only as single units. But once such juridical concerns have been met, the discretionary judgment of the district court should be given substantial deference, for that court is "the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears, supra*, at 437. The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.

Plainly, sound judicial administration does not require that Rule 54 (b) requests be granted routinely. That is implicit in commending them to the sound discretion of a district court. Because this discretion "is, with good reason, vested by the rule primarily" in the district courts, *Sears, supra*, at 437, and because the number of possible situations is large, we are

reluctant either to fix or sanction narrow guidelines for the district courts to follow. We are satisfied, however, that on the record here the District Court's assessment of the equities was reasonable.

One of the equities which the District Judge considered was the difference between the statutory and market rates of interest. Respondent correctly points out that adjustment of the statutory prejudgment interest rate is a matter within the province of the legislature, but that fact does not make the existing differential irrelevant for Rule 54 (b) purposes. If the judgment is otherwise certifiable, the fact that a litigant who has successfully reduced his claim to judgment stands to lose money because of the difference in interest rates is surely not a "just reason for delay."

The difference between the prejudgment and market interest rates was not the only factor considered by the District Court. The court also noted that the debts in issue were liquidated and large, and that absent Rule 54 (b) certification they would not be paid for "many months, if not years" because the rest of the litigation could be expected to continue for that period of time. The District Judge had noted earlier in his opinion on the merits of the release clause issue that respondent General Electric contested neither the amount of the debt nor the fact that it must eventually be paid. App. 164a–172a. The only contest was over the effect of the release clause on the timing of the payment, an isolated and strictly legal issue on which summary judgment had been entered against respondent.

The question before the District Court thus came down to which of the parties should get the benefit of the difference between the prejudgment and market rates of interest on debts admittedly owing and adjudged to be due while unrelated claims were litigated. The central factor weighing in favor of General Electric was that its pending counterclaims created the possibility of a setoff against the amount it owed petitioner.

This possibility was surely not an insignificant factor, especially since the counterclaims had survived a motion to dismiss for failure to state a claim. *Id.*, at 173a–174a. But the District Court took this into account when it determined that both litigants appeared to be in financially sound condition, and that Curtiss-Wright would be able to satisfy a judgment on the counterclaims should any be entered.

The Court of Appeals concluded that this was not enough, and suggested that the presence of such factors as economic duress and insolvency would be necessary to qualify the judgment for Rule 54 (b) certification. 597 F. 2d, at 36. But if Curtiss-Wright were under a threat of insolvency, that factor alone would weigh *against* qualifying; that very threat would cast doubt upon Curtiss-Wright's capacity to produce all or part of the $19 million should General Electric prevail on some of its counterclaims. Such a showing would thus in fact be self-defeating.

Nor is General Electric's solvency a dispositive factor; if its financial position were such that a delay in entry of judgment on Curtiss-Wright's claims would impair Curtiss-Wright's ability to collect on the judgment, that would weigh in favor of certification. But the fact that General Electric is capable of paying either now or later is not a "just reason for delay." At most, as the District Court found, the fact that neither party is or will become insolvent renders that factor neutral in a proper weighing of the equities involved.

The question in cases such as this is likely to be close, but the task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case. As we have noted, that assessment merits substantial deference on review. Here, the District Court's assessment of the equities between the parties was based on an intimate knowledge of the case and is a reasonable one. The District Court having found no other reason justifying delay, we conclude that it did not abuse its discretion in

granting petitioner's motion for certification under Rule 54 (b).[3]

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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[3] We note that Federal Rule of Civil Procedure 62 (h) allows a court certifying a judgment under Rule 54 (b) to stay its enforcement until the entering of a subsequent judgment or judgments. Rule 62 (h) also states that the court "may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered." Under this Rule, we assume it would be within the power of the District Court to protect all parties by having the losing party deposit the amount of the judgment with the court, directing the Clerk to purchase high yield government obligations and to hold them pending the outcome of the case. In this way, valid considerations of economic duress and solvency, which do not affect the juridical considerations involved in a Rule 54 (b) determination, can be provided for without preventing Rule 54 (b) certification.

In the instant case, after certifying the judgment as final under Rule 54 (b), the District Court granted respondent's motion for a stay of judgment without bond, but only pending resolution of the appeal.

CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. *v.* GREEN, ADMINISTRATRIX

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-1261. Argued January 7, 1980—Decided April 22, 1980

Respondent brought suit in Federal District Court in Indiana on behalf of her deceased son's estate, alleging that her son while a prisoner in a federal prison in Indiana suffered personal injuries from which he died because petitioner prison officials violated, *inter alia*, his Eighth Amendment rights by failing to give him proper medical attention. Asserting jurisdiction under 28 U. S. C. § 1331 (a), respondent claimed compensatory and punitive damages. The District Court held that the allegations pleaded a violation of the Eighth Amendment's proscription against cruel and unusual punishment, thus giving rise to a cause of action for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, under which it was established that victims of a constitutional violation by a federal official have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. But the court dismissed the complaint on the ground that, although the decedent could have maintained the action if he had survived, the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful-death laws, which the court construed as making the damages available to the decedent's estate insufficient to meet § 1331 (a)'s $10,000 jurisdictional-amount requirement. While otherwise agreeing with the District Court, the Court of Appeals held that the latter requirement was satisfied because whenever a state survivorship statute would abate a *Bivens*-type action, the federal common law allows survival of the action.

Held:

1. A *Bivens* remedy is available to respondent even though the allegations could also support a suit against the United States under the Federal Tort Claims Act (FTCA). Pp. 18-23.

(a) Neither of the situations in which a cause of action under *Bivens* may be defeated are present here. First, the case involves no special factors counseling hesitation in the absence of affirmative action by Congress, petitioners not enjoying such independent status in our

constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. Second, there is no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover damages from the officers but must be remitted to another remedy, equally effective in Congress' view. There is nothing in the FTCA or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations. Rather, in the absence of a contrary expression from Congress, the FTCA's provision creating a cause of action against the United States for intentional torts committed by federal law enforcement officers, contemplates that victims of the kind of intentional wrongdoing alleged in the complaint in this case shall have an action under the FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights. Pp. 18–20.

(b) The following factors also support the conclusion that Congress did not intend to limit respondent to an FTCA action: (i) the *Bivens* remedy, being recoverable against individuals, is a more effective deterrent than the FTCA remedy against the United States; (ii) punitive damages may be awarded in a *Bivens* suit, but are statutorily prohibited in an FTCA suit; (iii) a plaintiff cannot opt for a jury trial in an FTCA action as he may in a *Bivens* suit; and (iv) an action under the FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. Pp. 20–23.

2. Since *Bivens* actions are a creation of federal law, the question whether respondent's action survived her son's death is a question of federal law. Only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct. *Robertson* v. *Wegmann*, 436 U. S. 584, distinguished. Pp. 23–25.

581 F. 2d 669, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, in which STEWART, J., joined, *post*, p. 25. BURGER, C. J., *post*, p. 30, and REHNQUIST, J., *post*, p. 31, filed dissenting opinions.

Deputy Solicitor General Geller argued the cause for petitioners. On the briefs were *Solicitor General McCree, Acting*

Assistant Attorney General Daniel, Robert E. Kopp, and *Barbara L. Herwig.*

Michael Deutsch argued the cause for respondent. With him on the brief was *Charles Hoffman.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondent brought this suit in the District Court for the Southern District of Indiana on behalf of the estate of her deceased son, Joseph Jones, Jr., alleging that he suffered personal injuries from which he died because the petitioners, federal prison officials, violated his due process, equal protection, and Eighth Amendment rights.[1] Asserting jurisdiction under 28 U. S. C. § 1331 (a), she claimed compensatory and punitive damages for the constitutional violations. Two questions are presented for decision: (1) Is a remedy available directly under the Constitution, given that respondent's allegations could also support a suit against the United States

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**Alvin J. Bronstein, Bruce J. Ennis,* and *William E. Hellerstein* filed a brief for the American Civil Liberties Union Foundation, Inc., et al. as *amici curiae* urging affirmance.

John B. Jones, Jr., Norman Redlich, William L. Robinson, Norman J. Chachkin, and *Richard S. Kohn* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae.*

[1] More specifically, respondent alleged that petitioners, being fully apprised of the gross inadequacy of medical facilities and staff at the Federal Correction Center in Terre Haute, Ind., and of the seriousness of Jones' chronic asthmatic condition, nonetheless kept him in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthmatic attack, administered contraindicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital. The complaint further alleges that Jones' death resulted from these acts and omissions, that petitioners were deliberately indifferent to Jones' serious medical needs, and that their indifference was in part attributable to racial prejudice.

under the Federal Tort Claims Act?[2] And (2) if so, is survival of the cause of action governed by federal common law or by state statutes?

I

The District Court held that under *Estelle* v. *Gamble*, 429 U. S. 97 (1976), the allegations set out in note 1, *supra*, pleaded a violation of the Eighth Amendment's proscription against infliction of cruel and unusual punishment,[3] giving rise to a cause of action for damages under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The court recognized that the decedent could have maintained this action if he had survived, but dismissed the complaint because in its view the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful-death laws and, as the court construed those laws, the damages available to Jones' estate failed to meet § 1331 (a)'s $10,000 jurisdictional-amount requirement. The Court of Appeals for the Seventh Circuit agreed that an Eighth Amendment violation was pleaded under *Estelle* and that a cause of action was stated under *Bivens*, but reversed the holding that § 1331 (a)'s jurisdictional-amount requirement was not met.[4] Rather, the Court of Appeals held that

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[2] This question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so. *E. g.*, *Youakim* v. *Miller*, 425 U. S. 231 (1976). Here, the issue is squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case. See *Loe* v. *Armistead*, 582 F. 2d 1291 (CA4 1978), cert. pending *sub nom. Moffitt* v. *Loe*, No. 78–1260. We conclude that the interests of judicial administration will be served by addressing the issue on its merits.

[3] Petitioners do not contest the determination that the allegations satisfy the standards set out in *Estelle*.

[4] The relevant Indiana law provides that a personal injury claim does not survive where the acts complained of caused the victim's death. Ind.

§ 1331 (a) was satisfied because "whenever the relevant State survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action." 581 F. 2d 669, 675 (1978). The court reasoned that the Indiana law, if applied, would "subvert" "the policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure." *Id.*, at 674. We granted certiorari. 442 U. S. 940 (1979). We affirm.

II

Bivens established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U. S., at 396; *Davis* v. *Passman*, 442 U. S. 228, 245 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly

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Code § 34-1-1-1 (1976). Indiana does provide a wrongful-death cause of action for the personal representative of one whose death is caused by an alleged wrongful act or omission. Damages may "includ[e], but [are] not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings." But if the decedent is not survived by a spouse, dependent child, or dependent next of kin, then the recovery is limited to expenses incurred in connection with the death. Ind. Code § 34-1-1-2 (1976).

The District Court read the complaint in this case as stating claims under both §§ 34-1-1-1 and 34-1-1-2. Accordingly, the court assumed that recovery on the claim was limited to expenses (all of which would be paid by the Federal Government) only because Jones died without a spouse or any dependents. The Court of Appeals read the complaint as stating only a survivorship claim on behalf of Jones under § 34-1-1-1. Thus it assumed that the claim would have abated even if Jones had left dependents or a spouse. 581 F. 2d 669, 672, n. 4 (1978). Resolution of this conflict is irrelevant in light of our holding today.

under the Constitution and viewed as equally effective. *Bivens, supra,* at 397; *Davis* v. *Passman, supra,* at 245–247.

Neither situation obtains in this case. First, the case involves no special factors counselling hesitation in the absence of affirmative action by Congress. Petitioners do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate. *Davis* v. *Passman, supra,* at 246. Moreover, even if requiring them to defend respondent's suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them under *Butz* v. *Economou,* 438 U. S. 478 (1978), provides adequate protection. See *Davis* v. *Passman, supra,* at 246.

Second, we have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress. Petitioners point to nothing in the Federal Tort Claims Act (FTCA) or its legislative history to show that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations.[5] FTCA was enacted long before *Bivens* was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. § 2680 (h), the congressional comments accompanying

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[5] To satisfy this test, petitioners need not show that Congress recited any specific "magic words." See the dissenting opinion of THE CHIEF JUSTICE, *post,* at 31, and n. 2. Instead, our inquiry at this step in the analysis is whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy. Where Congress decides to enact a statutory remedy which it views as fully adequate only in combination with the *Bivens* remedy, *e. g.,* 28 U. S. C. § 2680 (h), that congressional decision should be given effect by the courts.

that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action:

> "[A]fter the date of enactment of this measure, innocent individuals who are subjected to raids [like that in *Bivens*] will have a cause of action against the individual Federal agents *and* the Federal Government. Furthermore, this provision should be viewed as a *counterpart* to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)." S. Rep. No. 93–588, p. 3 (1973) (emphasis supplied).

In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

This conclusion is buttressed by the significant fact that Congress follows the practice of explicitly stating when it means to make FTCA an exclusive remedy. See 38 U. S. C. § 4116 (a), 42 U. S. C. § 233 (a), 42 U. S. C. § 2458a, 10 U. S. C. § 1089 (a), and 22 U. S. C. § 817 (a) (malpractice by certain Government health personnel); 28 U. S. C. § 2679 (b) (operation of motor vehicles by federal employees); and 42 U. S. C. § 247b (k) (manufacturers of swine flu vaccine). Furthermore, Congress has not taken action on other bills that would expand the exclusivity of FTCA. See, *e. g.*, S. 695, 96th Cong., 1st Sess. (1979); H. R. 2659, 96th Cong., 1st Sess. (1979); S. 3314, 95th Cong., 2d Sess. (1978).

Four additional factors, each suggesting that the *Bivens* remedy is more effective than the FTCA remedy, also support our conclusion that Congress did not intend to limit respond-

ent to an FTCA action. First, the *Bivens* remedy, in addition to compensating victims, serves a deterrent purpose. See *Butz* v. *Economou*, *supra*, at 505.[6] Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States. It is almost axiomatic that the threat of damages has a deterrent effect,[7] *Imbler* v. *Pachtman*, 424 U. S. 409, 442 (1976) (WHITE, J., concurring in judgment), surely particularly so when the individual official faces personal financial liability.

Petitioners argue that FTCA liability is a more effective deterrent because the individual employees responsible for the Government's liability would risk loss of employment[8] and because the Government would be forced to promulgate corrective policies. That argument suggests, however, that the superiors would not take the same actions when an employee is found personally liable for violation of a citizen's constitutional rights. The more reasonable assumption is that responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity.

Second, our decisions, although not expressly addressing

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[6] Title 42 U. S. C. § 1983 serves similar purposes. See, *e. g.*, *Robertson* v. *Wegmann*, 436 U. S. 584, 590–591 (1978); *Carey* v. *Piphus*, 435 U. S. 247, 256 (1978); *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972); *Monroe* v. *Pape*, 365 U. S. 167, 172–187 (1961).

[7] Indeed, underlying the qualified immunity which public officials enjoy for actions taken in good faith is the fear that exposure to personal liability would otherwise deter them from acting at all. See *Butz* v. *Economou*, 438 U. S. 478, 497 (1978); *Scheuer* v. *Rhodes*, 416 U. S. 232, 240 (1974).

[8] Some doubt has been cast on the validity of the assumption that there exist adequate mechanisms for disciplining federal employees in such cases. See Testimony of Griffin B. Bell, Attorney General of the United States, Joint Hearing on Amendments to the Federal Tort Claims Act before the Subcommittee on Citizens and Shareholders Rights and Remedies and the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 95th Cong., 2d Sess., pt. 1, p. 6 (1978).

and deciding the question, indicate that punitive damages may be awarded in a *Bivens* suit. Punitive damages are "a particular remedial mechanism normally available in the federal courts," *Bivens*, 403 U. S., at 397, and are especially appropriate to redress the violation by a Government official of a citizen's constitutional rights. Moreover, punitive damages are available in "a proper" § 1983 action, *Carey* v. *Piphus*, 435 U. S. 247, 257, n. 11 (1978) (punitive damages not awarded because District Court found defendants "did not act with a malicious intention to deprive respondents of their rights or to do them other injury"),[9] and *Butz* v. *Economou*, suggests that the "constitutional design" would be stood on its head if federal officials did not face at least the same liability as state officials guilty of the same constitutional transgression. 438 U. S., at 504. But punitive damages in an FTCA suit are statutorily prohibited. 28 U. S. C. § 2674. Thus FTCA is that much less effective than a *Bivens* action as a deterrent to unconstitutional acts.

Third, a plaintiff cannot opt for a jury in an FTCA action, 28 U. S. C. § 2402, as he may in a *Bivens* suit.[10] Petitioners argue that this is an irrelevant difference because juries have been biased against *Bivens* claimants. Reply Brief for Petitioners 7, and n. 6; Brief for Petitioners 30–31, n. 30. Significantly, however, they do not assert that judges trying the claims as FTCA actions would have been more receptive, and

[9] Moreover, after *Carey* punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury.

[10] Petitioners argue that the availability of punitive damages or a jury trial under *Bivens* is irrelevant because neither is a *necessary* element of a remedial scheme. But that argument completely misses the mark. The issue is not whether a *Bivens* cause of action or any one of its particular features is essential. Rather the inquiry is whether Congress has created what it views as an *equally* effective remedial scheme. Otherwise the two can exist side by side. Moreover, no one difference need independently render FTCA inadequate. It can fail to be equally effective on the cumulative basis of more than one difference.

they cannot explain why the plaintiff should not retain the choice.

Fourth, an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward. 28 U. S. C. § 1346 (b) (United States liable "in accordance with the law of the place where the act or omission occurred"). Yet it is obvious that the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules. See Part III, *infra*. The question whether respondent's action for violations by federal officials of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.

Plainly FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated respondent exclusively to the FTCA remedy.

III

Bivens actions are a creation of federal law and, therefore, the question whether respondent's action survived Jones' death is a question of federal law. See *Burks* v. *Lasker*, 441 U. S. 471, 476 (1979). Petitioners, however, would have us fashion a federal rule of survivorship that incorporates the survivorship laws of the forum State, at least where the state law is not inconsistent with federal law. Respondent argues, on the other hand, that only a uniform federal rule of survivorship is compatible with the goal of deterring federal officials from infringing federal constitutional rights in the manner alleged in respondent's complaint. We agree with respondent. Whatever difficulty we might have resolving the question were the federal involvement less clear, we hold that only a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct.

In short, we agree with and adopt the reasoning of the Court of Appeals, 581 F. 2d, at 674–675 (footnote omitted):

> "The essentiality of the survival of civil rights claims for complete vindication of constitutional rights is buttressed by the need for uniform treatment of those claims, at least when they are against federal officials. As this very case illustrates, uniformity cannot be achieved if courts are limited to applicable state law. Here the relevant Indiana statute would not permit survival of the claim, while in *Beard* [v. *Robinson*, 563 F. 2d 331 (CA7 1977),] the Illinois statute permitted survival of the *Bivens* action. The liability of federal agents for violation of constitutional rights should not depend upon where the violation occurred. . . . In sum, we hold that whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action."

Robertson v. *Wegmann*, 436 U. S. 584 (1978), holding that a § 1983 action would abate in accordance with Louisiana survivorship law is not to the contrary. There the plaintiff's death was not caused by the acts of the defendants upon which the suit was based.[11] Moreover, *Robertson* expressly

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[11] *Robertson* fashioned its holding by reference to 42 U. S. C. § 1988, which requires that § 1983 actions be governed by

> "the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of [the] civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States."

Section 1988 does not in terms apply to *Bivens* actions, and there are cogent reasons not to apply it to such actions even by analogy. *Bivens* defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of § 1983 litigation to vary according to the laws of the States under whose authority § 1983 defendants work, federal officials have no similar

recognized that to prevent frustrations of the deterrence goals of § 1983 (which in part also underlie *Bivens* actions, see Part II, *supra*) "[a] state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him." 436 U. S., at 592. A federal official contemplating unconstitutional conduct similarly must be prepared to face the prospect of a *Bivens* action. A uniform rule that claims such as respondent's survive the decedent's death is essential if we are not to "frustrate in [an] important way the achievement" of the goals of *Bivens* actions. *Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696, 702 (1966).[12]

Affirmed.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, concurring in the judgment.

Although I join the judgment, I do not agree with much of the language in the Court's opinion. The Court states the principles governing *Bivens* actions as follows:

"*Bivens* established that the victims of a constitutional

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claim to be bound only by the law of the State in which they happen to work. *Bivens*, 403 U. S., at 409 (Harlan, J., concurring in judgment). Moreover, these petitioners have the power to transfer prisoners to facilities in any one of several States which may have different rules governing survivorship or other aspects of the case, thereby controlling to some extent the law that would apply to their own wrongdoing. See *Robertson*, 436 U. S., at 592–593, and n. 10. Another aspect of the power to transfer prisoners freely within the federal prison system is that there is no reason to expect that any given prisoner will have any ties to the State in which he is incarcerated, and, therefore, the State will have little interest in having its law applied to that prisoner. Nevertheless, as to other survivorship questions that may arise in *Bivens* actions, it may be that the federal law should choose to incorporate state rules as a matter of convenience. We leave such questions for another day.

[12] Otherwise, an official could know at the time he decided to act whether his intended victim's claim would survive. Cf. *Auto Workers* v. *Hoosier Cardinal Corp.* (whether statute of limitation will matter cannot be known at time of conduct).

> violation . . . have a right to recover damages. . . . Such a cause of action may be defeated . . . in two situations. The first is when defendants demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.' . . . The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. . . ." *Ante*, at 18–19 (emphasis in original).

The foregoing statement contains dicta that go well beyond the prior holdings of this Court.

I

We are concerned here with inferring a right of action for damages directly from the Constitution. In *Davis* v. *Passman*, 442 U. S. 228, 242 (1979), the Court said that persons who have "no [other] effective means" of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." The *Davis* rule now sets the boundaries of the "principled discretion" that must be brought to bear when a court is asked to infer a private cause of action not specified by the enacting authority. *Id.*, at 252 (POWELL, J., dissenting). But the Court's opinion, read literally, would restrict that discretion dramatically. Today we are told that a court must entertain a *Bivens* suit unless the action is "defeated" in one of two specified ways.

Bivens recognized that implied remedies may be unnecessary when Congress has provided "equally effective" alternative remedies. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 397 (1971); see *Davis* v. *Passman*, *supra*, at 248. The Court now volunteers the view that a defendant cannot defeat a *Bivens* action simply by showing that there are adequate alternative avenues of relief. The defendant also must show that Congress "explicitly declared [its rem-

edy] to be a *substitute* for recovery directly under the Constitution and viewed [it] as equally effective." *Ante,* at 18–19 (emphasis in original). These are unnecessarily rigid conditions. The Court cites no authority and advances no policy reason—indeed no reason at all—for imposing this threshold burden upon the defendant in an implied remedy case.

The Court does implicitly acknowledge that Congress possesses the power to enact adequate alternative remedies that would be exclusive. Yet, today's opinion apparently will permit *Bivens* plaintiffs to ignore entirely adequate remedies if Congress has not clothed them in the prescribed linguistic garb. No purpose is served by affording plaintiffs a choice of remedies in these circumstances. Nor is there any precedent for requiring federal courts to blind themselves to congressional intent expressed in language other than that which we prescribe.

A defendant also may defeat the *Bivens* remedy under today's decision if "special factors" counsel "hesitation." But the Court provides no further guidance on this point. The opinion states simply that no such factors are present in this case. The Court says that petitioners enjoy no "independent status in our constitutional scheme" that would make judicially created remedies inappropriate. *Ante,* at 19. But the implication that official status may be a "special factor" is withdrawn in the sentence that follows, which concludes that qualified immunity affords all the protection necessary to ensure the effective performance of official duties. No other factors relevant to the purported exception are mentioned.

One is left to wonder whether judicial discretion in this area will hereafter be confined to the question of alternative remedies, which is in turn reduced to the single determination that congressional action does or does not comport with the specifications prescribed by this Court. Such a drastic curtailment of discretion would be inconsistent with the Court's long-standing recognition that Congress is ultimately the appropriate body to create federal remedies. See *ante,* at 19–20;

Bivens v. *Six Unknown Fed. Narcotics Agents*, *supra*, at 397. A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task. In this situation, as Mr. Justice Harlan once said, a court should "take into account [a range of policy considerations] at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy." *Bivens*, *supra*, at 407. The Court does not explain why this discretion should be limited in the manner announced today.

The Court's absolute language is all the more puzzling because it comes in a case where the implied remedy is plainly appropriate under any measure of discretion. The Federal Tort Claims Act, on which petitioners rely, simply is not an adequate remedy.[1] And there are reasonably clear indications that Congress did not intend that statute to displace *Bivens* claims. See *ante*, at 19–20. No substantial contrary policy has been identified, and I am aware of none. I therefore agree that a private damages remedy properly is inferred from the Constitution in this case. But I do not agree that *Bivens* plaintiffs have a "right" to such a remedy whenever the defendant fails to show that Congress has "provided an [equally effective] alternative remedy which it explicitly

[1] The Federal Tort Claims Act is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person "would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b); see also 28 U. S. C. § 2674. Here, as in *Bivens* itself, a plaintiff denied his constitutional remedy would be remitted to the vagaries of state law. See 403 U. S., at 394–395. The FTCA gives the plaintiff even less than he would receive under state law in many cases, because the statute is hedged with protections for the United States. As the Court points out, the FTCA allows neither jury trial nor punitive damages. *Ante*, at 21–22. And recovery may be barred altogether if the claim arises from a "discretionary function" or "the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U. S. C. § 2680 (a).

declared to be a *substitute*. . . ." In my view, the Court's willingness to infer federal causes of action that cannot be found in the Constitution or in a statute denigrates the doctrine of separation of powers and hardly comports with a rational system of justice. Cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 730–749 (1979) (POWELL, J., dissenting).[2]

II

In Part III of its opinion, the Court holds that " 'whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action.' " *Ante*, at 24, quoting 581 F. 2d 669, 675 (CA7 1978). I agree that the relevant policies require the application of federal common law to allow survival in this case.

It is not "obvious" to me, however, that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules" in every case. *Ante*, at 23; see *ante*, at 23–24. On the contrary, federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes. The policy against invoking the federal common law except where necessary to the vitality of a federal claim is codified in 42 U. S. C. § 1988, which directs that state law ordinarily will govern those aspects of § 1983 actions not covered by the "laws of the United States."

The Court's opinion in this case does stop short of mandating uniform rules to govern all aspects of *Bivens* actions. *Ante*, at 24–25, n. 11. But the Court also says that the preference for state law embodied in § 1988 is irrelevant to the selection of rules that will govern actions against federal officers under *Bivens*. *Ibid.* I see no basis for this view. In

[2] I do not suggest that courts enjoy the same degree of freedom to infer causes of action from statutes as from the Constitution. See *Davis* v. *Passman*, 442 U. S. 228, 241–242 (1979). I do believe, however, that the Court today has overstepped the bounds of rational judicial decisionmaking in both contexts.

Butz v. *Economou*, 438 U. S. 478, 498–504, and n. 25 (1978), the Court thought it unseemly that different rules should govern the liability of federal and state officers for similar constitutional wrongs. I would not disturb that understanding today.

MR. CHIEF JUSTICE BURGER, dissenting.

Although I would be prepared to join an opinion giving effect to *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)—which I thought wrongly decided—I cannot join today's unwarranted expansion of that decision. The Federal Tort Claims Act provides an adequate remedy for prisoners' claims of medical mistreatment. For me, that is the end of the matter.

Under the test enunciated by the Court the adequacy of the Tort Claims Act remedy is an irrelevancy. The sole inquiry called for by the Court's new test is whether "Congress has provided an alternative remedy which *it explicitly declared* to be a *substitute* for recovery directly under the Constitution." *Ante*, at 18–19 (first emphasis added).[1] That test would seem to permit a person whose constitutional rights have been violated by a state officer to bring suit under *Bivens* even though Congress in 42 U. S. C. § 1983 has already fashioned an equally effective remedy. Cf. *Turpin* v. *Mailet*, 591 F. 2d 426 (CA2 1979) (en banc). After all, there is no "explicit congressional declaration," *ante*, at 19, that § 1983 was meant to pre-empt a *Bivens* remedy. Taken to its logical conclusion, the Court's test, coupled with its holding on survivorship, *ante*, at 23, and n. 11, suggests that the plaintiff in *Robertson* v. *Wegmann*, 436 U. S. 584 (1978), might have

[1] The Court pays lipservice to the notion that there must be no "special factors counselling hesitation in the absence of affirmative action by Congress." *Ante*, at 19. Its one-sentence discussion of the point, however, plainly shows that it is unlikely to hesitate unless Congress says that it must. See opinion of MR. JUSTICE POWELL, *ante*, at 27.

escaped the impact of that decision by filing a separate *Bivens*-type claim. And the Court's test throws into doubt the decision in *Brown* v. *GSA*, 425 U. S. 820 (1976), where we held that § 717 of the Civil Rights Act of 1964 provides the exclusive remedy for claims of discrimination in federal employment. In enacting § 717 Congress did not say the magic words which the Court now seems to require.[2]

Until today, I had thought that *Bivens* was limited to those circumstances in which a civil rights plaintiff had no other effective remedy. See 403 U. S., at 410 (Harlan, J., concurring in judgment); *Davis* v. *Passman*, 442 U. S. 228, 245, and n. 23 (1979). Now it would seem that implication of a *Bivens*-type remedy is permissible even though a victim of unlawful official action may be fully recompensed under an existing statutory scheme. I have difficulty believing that the Court has thought through, and intends the natural consequences of, this novel test; I cannot escape the conclusion that in future cases the Court will be obliged to retreat from the language of today's decision.[3]

MR. JUSTICE REHNQUIST, dissenting.

The Court today adopts a formalistic procedural approach for inferring private damages remedies from constitutional

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[2] In his concurrence in *Bivens*, Mr. Justice Harlan emphasized that judicial implication of a constitutional damages remedy was required because the Bill of Rights is aimed at "restraining the Government as an instrument of the popular will." 403 U. S., at 404. See generally J. Ely, Democracy and Distrust 73–104 (1980). Under the Harlan view, it would seem irrelevant whether Congress "meant to pre-empt a *Bivens* remedy." *Ante*, at 19. Rather the sole inquiry in every case—no matter what magic words Congress had said or failed to say—would be whether the alternative remedy gave satisfactory protection to constitutional interests. I note this point only to show how far the Court today strays from the principles underlying *Bivens*.

[3] In response to this dissent, the Court's opinion tells us that it is merely "giv[ing] effect" to what Congress intended. See *ante*, at 19, n. 5. Pre-

provisions that in my view still further highlights the wrong turn this Court took in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). Although ordinarily this Court should exercise judicial restraint in attempting to attain a wise accommodation between liberty and order under the Constitution, to dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an "unreality." *Kovacs* v. *Cooper*, 336 U. S. 77, 89 (1949) (concurring opinion). *Bivens* is a decision "by a closely divided court, unsupported by the confirmation of time," and, as a result of its weak precedential and doctrinal foundation, it cannot be viewed as a check on "the living process of striking a wise balance between liberty and order as new cases come here for adjudication." Cf. 336 U. S., at 89; *B. & W. Taxicab Co.* v. *B. & Y. Taxicab Co.*, 276 U. S. 518, 532–533 (1928) (Holmes, J., dissenting); *Hudgens* v. *NLRB*, 424 U. S. 507 (1976), overruling *Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308 (1968).[1]

The Court concludes that Congress intended a *Bivens* action under the Eighth Amendment to exist concurrently with actions under the Federal Tort Claims Act (FTCA) because Congress did not indicate that it meant the FTCA "to preempt a *Bivens* remedy or to create an equally effective

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sumably, this is a reference to the legislative history of the 1974 amendment to the FTCA, in which Congress, according to the Court, "made it crystal clear that . . . FTCA and *Bivens* [were] parallel, complementary causes of action." *Ante*, at 20. But as MR. JUSTICE REHNQUIST observes, the legislative history is far from clear. See *post*, at 33, n. 2. In any event, if the Court is correct in its reading of that history, then it is not really implying a cause of action under the Constitution; rather, it is simply construing a statute. If so, almost all of the Court's opinion is dicta.

[1] As observed by Mr. Justice Brandeis: "This Court, while recognizing the soundness of the rule of *stare decisis* where appropriate, has not hesitated to overrule earlier decisions shown, upon fuller consideration, to be erroneous." *Ashwander* v. *TVA*, 297 U. S. 288, 352–353 (1936) (concurring opinion).

remedy for constitutional violations," *ante*, at 19, nor are there any " 'special factors counselling [judicial] hesitation.' " *Ante*, at 18.[2] The Court's opinion otherwise lacks even an arguably principled basis for deciding in what circumstances an inferred constitutional damages remedy is appropriate and for defining the contours of such a remedy. And its "practical" conclusion is all the more anomalous in that Congress in 1974 amended the FTCA to permit private damages recoveries for intentional torts committed by federal law enforcement officers, thereby enabling persons injured by such officers' violations of their federal constitutional rights in many cases to obtain redress for their injuries.[3]

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[2] As suggested by MR. JUSTICE POWELL, this analysis is properly viewed as dicta in light of other statements in the Court's opinion. *Ante*, at 26, 28 (opinion concurring in judgment). The Court's opinion entirely disposes of this case by stating that "when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers, 28 U. S. C. § 2680 (h), the congressional comments accompanying that amendment *made it crystal clear* that Congress views FTCA and *Bivens* as parallel, complementary causes of action. . . ." *Ante*, at 19–20 (emphasis added). In light of these comments the Court concludes: "In the absence of a contrary expression from Congress, § 2680 (h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Ante*, at 20.

Although the Court finds these comments conclusive, in my view they do not purport to suggest that it is proper for courts to infer constitutional damages remedies in areas addressed by the FTCA. Rather, I think it more likely that they reflect Congress' understanding (albeit erroneous) that *Bivens* was a constitutionally required decision. If I am correct, the comments comprise merely an effort on the part of the Senate Committee to avoid what it perceived as a constitutional issue. In any event, the Report seems to be an uncertain basis for concluding that Congress supports the inference of a constitutional damages remedy here or in any other context.

[3] Under the FTCA, if a federal agent's official conduct would render a private person liable in accordance with "the law of the place where the

In my view, it is "an exercise of power that the Constitution does not give us" for this Court to infer a private civil damages remedy from the Eighth Amendment or any other constitutional provision. *Bivens*, 403 U. S., at 428 (Black, J., dissenting). The creation of such remedies is a task that is more appropriately viewed as falling within the legislative sphere of authority. *Ibid.*

I

Prior to *Bivens*, this Court in *Bell* v. *Hood*, 327 U. S. 678 (1946), held that an individual who brought suit against federal agents for an alleged violation of his constitutional rights had in a strictly procedural sense stated a claim that "arises" under the Constitution and must be entertained by federal courts. *Id.*, at 681–682. The Court did not, however, hold that the Constitution confers a substantive right to damages in this context. Rather, it merely decided that the proper disposition of the suit was a ruling on the merits, not dismissal for want of jurisdiction.[4]

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act or omission complained of occurred," 28 U. S. C. § 2674, recovery may be had against the United States except as provided in 28 U. S. C. § 2680. See also §§ 2672, 2675. And after *Bivens*, Congress amended the FTCA to allow direct recovery against the Government for certain intentional torts committed by federal officials. § 2680 (h). As the Court notes, however, punitive damages may not be assessed against the United States, § 2674, nor may prejudgment interest be so assessed.

[4] Indeed, on remand the District Court concluded that plaintiff had failed to state a federal claim upon which relief could be granted. *Bell* v. *Hood*, 71 F. Supp. 813 (SD Cal. 1947). In dismissing plaintiff's action the court observed that "[p]laintiffs are unable to point to any constitutional provision or federal statute giving one who has suffered an unreasonable search and seizure or false imprisonment by federal officers any Federal right or cause of action to recover damages from those officers as individuals." *Id.*, at 817. The District Court's opinion provided the foundation for many subsequent decisions reaching the same result. See, *e. g.*, *United States* v. *Faneca*, 332 F. 2d 872, 875 (CA5 1964), cert. denied, 380 U. S. 971 (1965); *Johnston* v. *Earle*, 245 F. 2d 793, 796 (CA9 1957); *Koch* v. *Zuieback*, 194 F. Supp. 651, 656 (SD Cal. 1961), aff'd, 316 F. 2d

Despite the lack of a textual constitutional foundation or any precedential or other historical support, *Bivens* inferred a constitutional damages remedy from the Fourth Amendment, authorizing a party whose constitutional rights had been infringed by a federal officer to recover damages from that officer. *Davis* v. *Passman*, 442 U. S. 228 (1979), subsequently held that such a remedy could also be inferred from the Due Process Clause of the Fifth Amendment. And the Court today further adds to the growing list of Amendments from which a civil damages remedy may be inferred. In so doing, the Court appears to be fashioning for itself a legislative role resembling that once thought to be the domain of Congress, when the latter created a damages remedy for individuals whose constitutional rights had been violated by state officials, 42 U. S. C. § 1983, and separately conferred jurisdiction on federal courts to hear such actions, 28 U. S. C. § 1343. See *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600 (1979).

A

In adding to the number of Amendments from which causes of actions may be inferred, the Court does not provide any guidance for deciding when a constitutional provision permits an inference that an individual may recover damages and when it does not. For example, the Eighth Amendment, from which the Court infers a cause of action today, also provides that "[e]xcessive bail shall not be required, nor excessive fines imposed. . . ." If a cause of action be inferred for violations of these and other constitutional rights—such as the Seventh Amendment right to a jury trial, the Sixth Amendment right to a speedy trial, and the Fifth Amendment privilege against compulsory self-incrimination—I think there is an ever-increasing likelihood that the attention of

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1 (CA9 1963); *Garfield* v. *Palmieri*, 193 F. Supp. 582, 586 (EDNY 1960), aff'd *per curiam*, 290 F. 2d 821 (CA2), cert. denied, 368 U. S. 827 (1961).

federal courts will be diverted from needs that in this policy-making context might well be considered to be more pressing. As observed by Mr. Justice Black at the time this Court "inferred" a cause of action under only the Fourth Amendment:

> "My fellow Justices on this Court and our brethren throughout the federal judiciary know only too well the time-consuming task of conscientiously poring over hundreds of thousands of pages of factual allegations of misconduct by police, judicial, and corrections officials. Of course, there are instances of legitimate grievances, but legislators might well desire to devote judicial resources to other problems of a more serious nature." 403 U. S., at 428 (dissenting opinion).

Because the judgments that must be made here involve many "competing policies, goals, and priorities" that are not well suited for evaluation by the Judicial Branch, in my view "[t]he task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the States." *Id.*, at 429.

B

It is clear under Art. III of the Constitution that Congress has broad authority to establish priorities for the allocation of judicial resources in defining the jurisdiction of federal courts. *Ex parte McCardle*, 7 Wall. 506 (1869); *Sheldon* v. *Sill*, 8 How. 441 (1850). Congress thus may prevent the federal courts from deciding cases that it believes would be an unwarranted expenditure of judicial time or would impair the ability of federal courts to dispose of matters that Congress considers to be more important. In reviewing Congress' judgment in this area, "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution. . . ." *Ex parte McCardle*,

supra, at 514. As stated by Mr. Justice Chase in *Turner* v. *Bank of North America*, 4 Dall. 8, 10, n. (1799):

> "The notion has frequently been entertained, that the federal Courts derive their judicial power immediately from the constitution; but the political truth is, that the disposal of the judicial power, (except in a few specified instances) belongs to congress. If congress has given the power to this Court, we posess [*sic*] it, not otherwise: and if congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of federal Courts, to every subject, in every form, which the constitution might warrant."

See also *Sheldon* v. *Sill*, *supra*, at 449.

While it is analytically correct to view the question of jurisdiction as distinct from that of the appropriate relief to be granted, see *Davis* v. *Passman*, *supra*, at 239–240, n. 18, congressional authority here may all too easily be undermined when the judiciary, under the guise of exercising its authority to fashion appropriate relief, creates expansive damages remedies that have not been authorized by Congress. Just as there are some tasks that Congress may *not* impose on an Art. III court, *Gordon* v. *United States*, 2 Wall. 561 (1865); *United States* v. *Klein*, 13 Wall. 128 (1872), there are others that an Art. III court may not simply seize for itself without congressional authorization. This concern is initially reflected in the notion that federal courts do not have the authority to act as general courts of common law absent congressional authorization.

In *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651 (1963), the Court observed that "[a]s respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 [1938]." *Erie* expressly rejected the

view, previously adopted in *Swift* v. *Tyson*, 16 Pet. 1 (1842), that federal courts may declare rules of general common law in civil fields. And it has long been established that federal courts lack the authority to create a common law of crimes. *United States* v. *Hudson & Goodwin*, 7 Cranch 32 (1812). *Hudson & Goodwin* rested on the notion that:

> "The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions—that power is to be exercised by Courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the Courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other Courts created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer." *Id.*, at 33.

Thus, the Court in *Hudson* concluded:

> "It is not necessary to inquire whether the general Government, in any and what extent, possesses the power of conferring on its Courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those Courts as a consequence of their creation." *Ibid.*

In my view the authority of federal courts to fashion remedies based on the "common law" of damages for constitutional violations likewise falls within the legislative domain, and does not exist where not conferred by Congress.

The determination by federal courts of the scope of such a remedy involves the creation of a body of common law analogous to that repudiated in *Erie* and *Hudson & Goodwin*. This determination raises such questions as the types of damages recoverable, the injuries compensable, the degree of intent required for recovery, and the extent to which official immunity will be available as a defense. And the creation of such a remedy by federal courts has the effect of diverting judicial resources from areas that Congress has explicitly provided for by statute. It thereby may impair the ability of federal courts to comply with judicial priorities established by Congress.

Congress' general grant of jurisdiction to federal courts under 28 U. S. C. § 1331 does not permit those courts to create a remedy for the award of damages whenever an individual's constitutional rights have been violated. While § 1331 grants federal courts jurisdiction to hear cases that arise under the Constitution, it makes no provision whatsoever for the award of such damages, nor, as noted above, is there any precedential or other historical support for such a remedy prior to *Bivens*.[5]

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[5] In his concurrence in *Bivens*, Mr. Justice Harlan relied heavily on decisions of this Court that have inferred private damages remedies from federal statutes. See, *e. g.*, 403 U. S., at 402, 402–403, n. 4, 406, 407, 410–411. Thus, he states: "The *Borak* case [*J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964)] is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. . . . The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, . . . nor did the *Borak* Court purport to do so. See *Borak*, *supra*, at 432–434. The notion of 'implying' a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law." *Id.*, at 402–403, n. 4.

In light of this Court's recent decisions in *Touche Ross & Co.* v. *Redington*, 442 U. S. 560 (1979), and *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), it is clear that there is nothing left of the

By contrast, it is obvious that when Congress has wished to authorize federal courts to grant damages relief, it has known how to do so and has done so expressly. For example, in 42 U. S. C. § 1983 Congress explicitly provided for federal courts to award damages against state officials who violate an individual's constitutional rights.[6] With respect to federal officials, however, it has never provided for these types of damages awards.[7] Rather, it chose a different route in 1974 by elimi-

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rationale of *Borak*. As observed in both those cases, it is obvious that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross*, *supra*, at 572; *Transamerica*, *supra*, at 21. Because the statutes at issue in those cases did not expressly provide for such a remedy and there was no clear evidence of such a congressional intention in their legislative history, the Court, unlike in *Borak*, declined to imply a damages remedy from the statutes' broad language. *Touche Ross* and *Transamerica* thereby undermine the principal foundation of Mr. Justice Harlan's concurring opinion in *Bivens*. Thus, in spite of his cursory comment that for a *Bivens* plaintiff "it is damages or nothing," 403 U. S., at 410, I doubt that Mr. Justice Harlan would today reach the same conclusion that he did in *Bivens* in 1971, especially in light of his statement that "[m]y initial view of this case was that the Court of Appeals was correct in dismissing the complaint, but for reasons stated in this opinion I am now persuaded to the contrary." *Id.*, at 398.

[6] Title 42 U. S. C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[7] Indeed, in discussing the scope of authority conferred on federal courts by § 1983, Senator Thurman stated at the time § 1983 was adopted:

"[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy." Cong. Globe,

nating the immunity of federal officials under the FTCA. See n. 2, *supra*.

Congress has also created numerous express causes of actions for damages in other areas. See, *e. g.*, Fair Labor Standards Act, 29 U. S. C. § 216 (b); Civil Rights Act of 1968, 42 U. S. C. § 3612 (c); Federal Employers' Liability Act, 45 U. S. C. §§ 51–60. While the injuries for which such damages have been authorized may seem less important than violations of constitutional rights by federal officials, Congress has nonetheless said that it wants federal courts to hear the former, and has not similarly spoken with respect to the latter.

In my view, absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations. Although Congress surely may direct federal courts to grant relief in *Bivens*-type actions, it is enough that it has not done so. As stated by this Court in *Wheeldin* v. *Wheeler*, 373 U. S., at 652, which declined to create an implied cause of action for federal officials' abuse of their statutory authority to issue subpoenas:

> "Over the years Congress has considered the problem of state civil and criminal actions against federal officials many times. . . . But no general statute making federal officers liable for acts committed 'under color,' but in violation, of their federal authority has been passed. . . . That state law governs the cause of action alleged is shown by the fact that removal is possible in a nondiversity case such as this one only because the interpretation of a federal defense makes the case one 'arising under'

42d Cong., 1st Sess., App. 216–217 (1871), quoted in *Owen* v. *City of Independence*, 445 U. S. 622, 636–637, n. 17 (1980).

Since Senator Thurman was a staunch opponent of § 1983, the latter part of this statement may be viewed as not unlike the "parade of horribles" frequently marshaled against a pending measure and not the most reliable source of legislative history. But the first part of the statement quite certainly expressed the view entertained by students of federal jurisdiction until very recently.

> the Constitution or laws of the United States. . . . [I]t is not for us to fill any *hiatus* Congress has left in this area."

Because Congress also has never provided for a *Bivens*-type damages award, I think the appropriate course is for federal courts to dismiss such actions for failure to state a claim upon which relief can be granted. Congress did not even grant to federal courts a general jurisdiction to entertain cases arising under the Constitution until 1875. Act of Mar. 3, 1875, § 1, 18 Stat. 470. It thus would seem that the most reasonable explanation for Congress' failure explicitly to provide for damages in *Bivens* actions is that Congress intended to leave this responsibility to state courts in the application of their common law, or to put it conversely to preclude federal courts from granting such relief.

The authority of federal courts "to adjust their remedies so as to grant the necessary relief," *Bell* v. *Hood*, 327 U. S., at 684; *Bivens*, 403 U. S., at 392; *Davis* v. *Passman*, 442 U. S., at 245, does not suggest a contrary conclusion. While federal courts have historically had broad authority to fashion equitable remedies,[8] it does not follow that absent congressional authorization they may also grant damages awards for constitutional violations that would traditionally be regarded as remedies at law. The broad power of federal courts to grant equitable relief for constitutional violations has long been established. As this Court observed in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971):

"Once a right and a violation have been shown, the scope

[8] Indeed, the principal cases relied on in *Bell*, *Bivens*, and *Davis* for the principle that federal courts have broad authority to fashion appropriate relief are equitable. *Marbury* v. *Madison*, 1 Cranch 137 (1803), for example, which is referred to in those decisions and relied on in *Bell* for the principle that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief," 327 U. S., at 684, involved equitable relief by way of mandamus or injunction.

> of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
>
> " 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329–330 (1944), cited in *Brown* [v. *Board of Education*, 349 U. S. 294, 300 (1955)]."

Thus, for example, in *Ex parte Young*, 209 U. S. 123 (1908), it was held that a federal court may enjoin a state officer from enforcing penalties and remedies provided by an unconstitutional statute. See also, *e. g.*, *Osborn* v. *United States Bank*, 9 Wheat. 738, 838–846, 859 (1824).

No similar authority of federal courts to award damages for violations of constitutional rights had ever been recognized prior to *Bivens*.[9] And no statutory grant by Congress supports the exercise of such authority by federal courts. The Rules of Decision Act, for example, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S. C. § 1652. And the All Writs Act authorizes this Court and lower federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U. S. C. § 1651. Neither these statutes, nor 28 U. S. C. § 1331, authorizes fed-

[9] The Just Compensation Clause of the Fifth Amendment is not an exception here because the express language of that Clause requires that "compensation" be paid for any governmental taking.

eral courts to create a body of common-law damages remedies for constitutional violations or any other legal wrong. And as previously discussed, federal courts do not have the authority to act as general courts of common law absent authorization by Congress.

In light of the absence of any congressional authorization or historical support, I do not think the equitable authority of federal courts to grant "the necessary relief" provides a foundation for inferring a body of common-law damages remedies from various constitutional provisions. I believe my conclusion here is further supported by an examination of the difficulties that arise in attempting to delimit the contours of the damages remedy that the Court has held should be available when an individual's constitutional rights are violated.

II

The Court concludes, as noted above, that respondent may recover damages as a result of an inferred remedy under the Eighth Amendment because "nothing in the Federal Tort Claims Act (FTCA) or its legislative history . . . show[s] that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations," *ante*, at 19, nor are there any " 'special factors counselling [judicial] hesitation.' " *Ante*, at 18. After observing that Congress did not explicitly state in the FTCA or its legislative history that the FTCA was intended to provide such a remedy, the Court points to "[f]our additional factors" that suggest a "*Bivens* remedy is more effective than the FTCA remedy" in attempting to ascertain congressional intention here. *Ante*, at 20. The first is that the *Bivens* remedy is recoverable against individuals whereas the FTCA remedy is against the United States, and thus the *Bivens* remedy more effectively serves the deterrent purpose articulated in *Bivens*.

The Court not only fails to explain why the *Bivens* remedy is effective in the promotion of deterrence, but also does not provide any reason for believing that other sanctions on fed-

eral employees—such as a threat of deductions in pay, reprimand, suspension, or firing—will be ineffective in promoting the desired level of deterrence, or that Congress did not consider the marginal increase in deterrence here to be outweighed by other considerations. See, *e. g.*, Bell, Proposed Amendments to the Federal Tort Claims Act, 16 Harv. J. on Leg. 1, 13 (1979). And while it may be generally true that the extent to which a sanction is imposed directly on a wrongdoer will have an impact on the effectiveness of a deterrent remedy,[10] there are also a number of other factors that must be taken into account—such as the amount of damages necessary to offset the benefits of the objectionable conduct, the risk that the wrongdoer might escape liability, the clarity with which the objectionable conduct is defined, and the perceptions of the individual who is a potential wrongdoer. In a *Bivens* action, however, there is no relationship whatsoever between the damages awarded and the benefits from infringing the individual's rights because the damages award focuses

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[10] It must also be remembered that along with the greater deterrent effect resulting from liability imposed directly on the governmental wrongdoer, there is also strong potential for distortion of governmental decisionmaking as a result of the threat of liability. Thus, MR. JUSTICE BRENNAN in his opinion for the Court in *Owen* v. *City of Independence*, 445 U. S., at 655–656, states:

"At the heart of [the] justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed."

The fact that Congress in the FTCA has provided for a remedy against the United States, rather than against federal officials, thus does not suggest that Congress views a *Bivens* remedy as desirable because of its deterrent effect. Rather, it is at least equally, if not more, plausible that Congress viewed the approach in the FTCA to be preferable because of the potential impact on governmental decisionmaking that might result from the threat of personal liability.

solely on the loss to the plaintiff. The damages in such an action do not take into account the risk that the wrongdoer will escape liability altogether. In addition, it is often not clear what conduct violates the Constitution, see, *e. g.*, *Owen* v. *City of Independence*, 445 U. S. 622 (1980);[11] *California* v. *Minjares*, 443 U. S. 916, 917–919 (1979) (REHNQUIST, J., dissenting from denial of stay). In many cases the uncertainty as to what constitutes a constitutional violation will impair the deterrent impact of a *Bivens* remedy.[12] Finally, the perceptions of the potential wrongdoer as to the above considerations may also detract from the deterrent effect of a *Bivens* action. The Court makes no attempt to assess these factors or to examine them in relation to an FTCA action. In my view, its assertion that the *Bivens* remedy is a more effective deterrent than the FTCA remedy, and that this is a reason for concluding that Congress intended *Bivens* actions to exist concurrently with FTCA actions, remains an unsupported assertion.[13]

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[11] For example, in *Owen*, which relies partially on a deterrence rationale, 445 U. S., at 651–652, the conduct causing the alleged injury to plaintiff had not been held to be a constitutional violation at the time it was committed. It is thus readily apparent that the imposition of damages in *Owen* had no deterrent impact whatsoever.

[12] Even where the legal principles are not in flux, the constitutional standard may be sufficiently general that it is difficult to predict in advance whether a particular set of facts amounts to a constitutional violation. For example, as interpreted by this Court, the Due Process Clause of the Fourteenth Amendment may be violated by conduct that offends traditional notions of "fair play and substantial justice," *Shaffer* v. *Heitner*, 433 U. S. 186, 207, 212 (1977), or that "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952).

[13] Although the Court states that a *Bivens* remedy is recoverable against individuals, it does not state that the damages paid in a *Bivens* action actually come out of the federal employee's pocket. And even if they did, as explained above, it is not clear that the award would promote deterrence, or that any marginal increase in deterrence would outweigh other considerations that counsel against judicial creation of this type of remedy.

In addition, there are important policy considerations at stake here that Congress may decide outweigh the interest in deterrence promoted by personal liability of federal officials. Indeed, the fear of personal liability may "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949) (L. Hand). And, as one commentator has observed: "Despite the small odds an employee will actually be held liable in a civil suit, morale within the federal services has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous." Bell, 16 Harv. J. on Leg., *supra*, at 6.

The Court next argues that Congress did not intend the FTCA to displace the *Bivens* remedy because it did not provide for punitive damages in the FTCA. As the Court observes, we have not "expressly address[ed] and decid[ed] the question" whether punitive damages may be awarded in a *Bivens* suit. *Ante*, at 21–22. And despite the Court's assertion to the contrary, we have also not done so with respect to § 1983 actions. In *Carey* v. *Piphus*, 435 U. S. 247, 257, n. 11 (1978), this Court explicitly stated that "we imply no approval or disapproval of any of [the] cases" that have awarded punitive damages in § 1983 actions. Because this Court has never reached the question whether punitive damages may be awarded in either a *Bivens* or § 1983 action, I think serious doubts arise as to the Court's claim that an FTCA action is not as effective as a *Bivens* action because the FTCA does not permit punitive damages awards. Indeed, this Court in *Carey* also stated that "[t]o the extent that Congress intended that [damages] awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages." 435 U. S., at 256–257.

Even if punitive damages were appropriate in a *Bivens* action, such damages are typically determined by reference

to factors such as the character of the wrong, the amount necessary to "punish" the defendant, etc., and the jury has a great deal of discretion in deciding both whether such damages should be awarded and the amount of the punitive award. See, *e. g.*, C. McCormick, Law of Damages § 85 (1935). The determination whether this or some other remedy—such as a fixed fine, a threat of being reprimanded, suspended, or fired, or simply compensatory damages—provides the desired level of deterrence is one for Congress. This Court should defer to Congress even when Congress has not explicitly stated that its remedy is a substitute for a *Bivens* action.

The third factor relied on by the Court to support its conclusion that Congress did not intend the FTCA to serve as a substitute for a *Bivens* action is that a plaintiff cannot opt for a jury in a FTCA action while he can in a *Bivens* suit. The Court, however, offers no reason why a judge is preferable to a jury, or vice versa, in this context. Rather, the Court merely notes that petitioners cannot explain why plaintiffs should not retain the choice between a judge and jury. *Ante*, at 23, and n. 9. I do not think the fact that Congress failed to specify that the FTCA was a substitute for a *Bivens* action supports the conclusion that Congress viewed the plaintiff's ability to choose between a judge and a jury as a reason for retaining a *Bivens* action in addition to an action under the FTCA.

Finally, I do not think it is obvious, as the Court states, that liability of federal officials for violations of constitutional rights should be governed by uniform rules absent an explicit statement by Congress indicating a contrary intention. The importance of federalism in our constitutional system has been recognized both by this Court, see, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971), and by Congress, see, *e. g.*, 42 U. S. C. § 1988, and in accommodating the values of federalism with other constitutional principles and congressional statutes, this Court has often deferred to state rules. See, *e. g.*, *Rob-*

ertson v. *Wegmann*, 436 U. S. 584 (1978); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975). As observed by MR. JUSTICE POWELL, "federal courts routinely refer to state law to fill the procedural gaps in national remedial schemes." *Ante*, at 29 (opinion concurring in judgment).[14] Indeed, the Rules of Decision Act would seem ordinarily to require it. 28 U. S. C. § 1652.

Once we get past the level of a high-school civics text, it is simply not self-evident to merely assert that here we have a federal cause of action for violations of federal rights by federal officials, and thus the question whether reference to state procedure is appropriate "admits of only a negative answer in the absence of a contrary congressional resolution." *Ante*, at 23. The Court articulates no solid basis for concluding that there is any interest in uniformity that should generally be viewed as significant. Although the Court identifies "deterrence" as an objective of a *Bivens* action, a § 1983 action, which is also a creation of federal law, has been recognized by this Court as having a similar objective in the promotion of deterrence. See, *e. g.*, *Carey* v. *Piphus*, *supra*, at 257; *Robertson* v. *Wegmann*, 436 U. S., at 592; *Imbler* v. *Pachtman*, *supra*, at 442 (WHITE, J., concurring in judgment).[15]

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[14] Like a *Bivens* action, a § 1983 action is a creation of federal law and an exclusively federal right. Congress in § 1988 nonetheless "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983. *Robertson* v. *Wegmann*, 436 U. S., at 593. See also n. 10, *supra*. Although a § 1983 action is against state officers and a *Bivens* action is against federal officers, it does not follow that there is an obvious interest in application of uniform rules. Indeed, the controlling authority is to the contrary. See, *e. g.*, *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S., at 462, and cases cited therein; *infra*, at 50.

[15] *Robertson* reveals that, however one views the appropriateness of the Court's refusal to apply Indiana survivorship law in this case, the objective of deterrence does not mean that application of state law is inappropriate for filling procedural gaps in *Bivens* actions on the ground that the state rule will result in an unfavorable outcome for the plaintiff.

And with respect to such actions state procedural rules are generally controlling, see, *e. g., Robertson* v. *Wegmann, supra.* As observed in *Robertson, supra,* at 593:

> "It is true that § 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' *Mitchum* v. *Foster,* [407 U. S. 225,] 239. That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representatives) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." [16]

I think the congressional determination to defer to state procedural rules in the § 1983 context indicates the weak foundation upon which the Court's analysis here rests.[17]

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[16] The Court states as one justification for its refusal to apply Indiana survivorship law that here the suit is against federal officials whereas § 1983 actions, which are subject to the requirements of § 1988, are against state officers. *Ante,* at 24–25, n. 11. Section 1988, however, applies not only to claims against state officers under § 1983, but also to suits under §§ 1981, 1982, and 1985, which do not require state action. And the Rules of Decision Act applies by its terms to federal causes of action, whether or not against federal officials. Thus, the asserted interest in uniform rules of procedure in federal actions against federal officials, absent more, is unpersuasive and not justified in light of established practice.

[17] Any alleged inconsistency with the policies of federal law here is highly speculative at best. In order to find even a marginal influence on behavior as a result of Indiana's survivorship provisions, one would have to assume not only that federal officials have both the desire and ability to select as victims only those persons who would not be survived by any

In my view, the fact that Congress has created a tort remedy against federal officials at all, as it has done here under the FTCA, is dispositive. The policy questions at issue in the creation of any tort remedies, constitutional or otherwise, involve judgments as to diverse factors that are more appropriately made by the legislature than by this Court in an attempt to fashion a constitutional common law. This Court stated in *TVA* v. *Hill*, 437 U. S. 153, 194 (1978):

> "Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While '[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."

Here Congress has provided no indication that it believes sound policy favors damages awards against federal officials for violations of constitutional rights.

III

I think the Court acknowledges the legislative nature of the determinations involved here when it states that such a

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close relatives, but also that (1) they are aware that if the victim dies survivorship law will preclude recovery, (2) they would intentionally kill the individual or permit him to die, rather than violate his constitutional rights to a lesser extent, in order to avoid liability under *Bivens*, and (3) a *Bivens* remedy will have a deterrent impact in these circumstances beyond that of ordinary criminal sanctions. In addition, one must include in the evaluation a consideration of competing policies that Congress may wish to promote.

remedy may be defeated when "Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy." *Ante*, at 19, n. 5. Here Congress did not do so because in the Court's words: "In the absence of a contrary expression from Congress, § 2680 (h) . . . contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Ante*, at 20. But under the Court's rationale if Congress had made clear that it intended the FTCA to displace judicially inferred remedies under the Constitution, this Court must defer to that legislative judgment.[18] This principle was also recognized in *Bivens*, wherein the Court noted that Congress had given no indication that it viewed any other remedy to be as effective as the damages remedy inferred by the Court from the Fourth Amendment. 403 U. S., at 397. See also *Davis* v. *Passman*, 442 U. S., at 245, 246–247; *Butz* v. *Economou*, 438 U. S. 478, 504 (1978).

I agree with the Court that Congress is free to devise whatever remedy it sees fit to redress violations of constitutional rights sued upon in Art. III courts, and to have that

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[18] Thus, although it does not appear that Congress explicitly stated that § 1983 is intended as the exclusive remedy for violations of constitutional rights by state officials, it would clearly be invasion of the legislative province for this Court to fashion a constitutional damages remedy against state officials that would exist concurrently with § 1983. As this Court observed with respect to its creation of a *Bivens* action, "[t]he presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." *Butz* v. *Economou*, 438 U. S. 478, 503 (1978). Here Congress' action in adopting 42 U. S. C. § 1983 demonstrates that Congress has exercised its judgment in balancing the relevant policies and in determining the nature and scope of the damages remedy against state officials who violate an individual's federal constitutional rights. In light of traditional notions of separation of powers, its judgment is conclusive.

remedy altogether displace any private civil damages remedies that this Court may devise. I disagree, however, that, unless "special factors" counsel hesitation, Congress must make some affirmative showing that it intends its action to provide such redress before this Court will deem Congress' action to be an adequate substitute for an inferred remedy.[19] The requirement of such congressional action is a formal procedural device that not only serves little useful purpose, but also subverts the policymaking authority vested by the Constitution in the Legislative Branch. Its application in this case, through the Court's attempt to ascertain congressional intention by examining whether the FTCA or a *Bivens* action is "more effective," in my view demonstrates that the creation of constitutional damages remedies involves policy considerations that are more appropriately made by the Legislative rather than the Judicial Branch of our Government.

IV

I think the Court's formalistic procedural approach to this problem is flawed for one additional reason. As noted above, the approach adopted by the Court in *Bivens* and reaffirmed today is one that permits Congress to displace this Court in fashioning a constitutional common law of its choosing merely by indicating that it intends to do so. *Ante*, at 19, n. 5. Otherwise, unless special factors counsel "hesitation," it will be presumed under the Court's analysis that Congress intended any remedy it creates to be enforced simultaneously by federal courts with a *Bivens* action. The Court provides no justification for this canon of divining legislative intention. Presumably when Congress creates and defines the limits of a cause of action, it has taken into account competing considerations and struck what it considers to be an appropriate balance among them. In my view it is wholly at odds with traditional

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[19] As MR. JUSTICE POWELL states, the Court did not go this far even in *Bivens*. *Ante*, at 26–27 (opinion concurring in judgment).

principles for interpretation of legislative intention and with the constitutional notion of separation of powers to conclude that because Congress failed to indicate that it did not intend the cause of action and its limitations to be defined otherwise, it intended for this Court to exercise free rein in fashioning additional rules for recovery of damages under the guise of an inferred constitutional damages action.

For the foregoing reasons I dissent, and would reverse the judgment.

Syllabus

CITY OF MOBILE, ALABAMA, ET AL. *v.* BOLDEN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-1844. Argued March 19, 1979—Reargued October 29, 1979—Decided April 22, 1980

Mobile, Ala., is governed by a Commission consisting of three members elected at large who jointly exercise all legislative, executive, and administrative power in the city. Appellees brought a class action in Federal District Court against the city and the incumbent Commissioners on behalf of all Negro citizens of the city, alleging, *inter alia*, that the practice of electing the City Commissioners at large unfairly diluted the voting strength of Negroes in violation of the Fourteenth and Fifteenth Amendments. Although finding that Negroes in Mobile "register and vote without hindrance," the District Court nevertheless held that the at-large electoral system violated the Fifteenth Amendment and invidiously discriminated against Negroes in violation of the Equal Protection Clause of the Fourteenth Amendment, and ordered that the Commission be disestablished and replaced by a Mayor and a Council elected from single-member districts. The Court of Appeals affirmed.

Held: The judgment is reversed, and the case is remanded. Pp. 61–80; 80–83; 83–94.

571 F. 2d 238, reversed and remanded.

MR. JUSTICE STEWART, joined by THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, concluded:

1. Mobile's at-large electoral system does not violate the rights of the city's Negro voters in contravention of the Fifteenth Amendment. Racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. The Amendment does not entail the right to have Negro candidates elected but prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Here, having found that Negroes in Mobile register and vote without hindrance, the courts below erred in believing that appellants invaded the protection of the Fifteenth Amendment. Pp. 61–65.

2. Nor does Mobile's at-large electoral system violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 65–80.

(a) Only if there is purposeful discrimination can there be a violation of the Equal Protection Clause. And this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Pp. 66–68.

(b) Disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution. Where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. Pp. 68–70.

(c) Even assuming that an at-large municipal electoral system such as Mobile's is constitutionally indistinguishable from the election of a few members of a state legislature in multimember districts, it is clear that the evidence in this case fell far short of showing that appellants "conceived or operated [a] purposeful devic[e] to further racial . . . discrimination," *Whitcomb* v. *Chavis*, 403 U. S. 124, 149. Pp. 70–74.

(d) The Equal Protection Clause does not require proportional representation as an imperative of political organization. While the Clause confers a substantive right to participate in elections on an equal basis with other qualified voters, this right does not protect any "political group," however defined, from electoral defeat. Since Mobile is a unitary electoral district and the Commission elections are conducted at large, there can be no claim that the "one person, one vote" principle has been violated, and therefore nobody's vote has been "diluted" in the sense in which that word was used in *Reynolds* v. *Sims*, 377 U. S. 533. Pp. 75–80.

MR. JUSTICE BLACKMUN concluded that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion. The court at least should have considered alternative remedial orders to converting Mobile's government to a mayor-council system, and in failing to do so the court appears to have been overly concerned with eliminating at-large elections *per se*, rather than with structuring an electoral system that provided an opportunity for black voters to participate in the city's government on an equal footing with whites. Pp. 80–83.

MR. JUSTICE STEVENS concluded that the proper standard for adjudging the constitutionality of a political structure, such as Mobile's, that treats all individuals as equals but adversely affects the political strength of an identifiable minority group, is the same whether the minority is identified by a racial, ethnic, religious, or economic characteristic; that *Gomillion* v. *Lightfoot*, 364 U. S. 339, suggests that the standard asks

(1) whether the political structure is manifestly not the product of a routine or traditional decision, (2) whether it has a significant adverse impact on a minority group, and (3) whether it is unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority; and that the standard focuses on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. Under this standard the choice to retain Mobile's commission form of government must be accepted as constitutionally permissible even though the choice may well be the product of mixed motivation, some of which is invidious. Pp. 83–94.

STEWART, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 80. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 83. BRENNAN, J., *post*, p. 94, WHITE, J., *post*, p. 94, and MARSHALL, J., *post*, p. 103, filed dissenting opinions.

Charles S. Rhyne reargued the cause for appellants. With him on the brief on reargument were *C. B. Arendall, Jr.*, *William C. Tidwell III*, *Fred G. Collins*, and *William S. Rhyne*. With him on the briefs on the original argument were Messrs. Arendall, Collins, and Rhyne, *Donald A. Carr*, and *Martin W. Matzen*.

J. U. Blacksher reargued the cause for appellees. With him on the briefs were *Larry Menefee*, *Jack Greenberg*, and *Eric Schnapper*.

Deputy Assistant Attorney General Turner reargued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree*, *Assistant Attorney General Days*, *Deputy Solicitor General Wallace*, *Elinor Hadley Stillman*, *Brian K. Landsberg*, *Jessica Dunsay Silver*, *Dennis J. Dimsey*, and *Miriam R. Eisenstein*.*

**Charles A. Bane*, *Thomas D. Barr*, *Norman Redlich*, *Frank R. Parker*, and *Robert A. Murphy* filed a brief for the Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST joined.

The city of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment, and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was

[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, as amended, 42 U. S. C. § 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3) (1976 ed., Supp. II). Those claims have not been pressed in this Court.

[3] The District Court has stayed its orders pending disposition of the present appeal.

appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, 439 U. S. 815. The case was originally argued in the 1978 Term, and was reargued in the present Term.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911, cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at large for a term of four years in one of three numbered posts, and may be elected

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[4] Ala. Code § 11–43 (1975).

[5] Act No. 281, 1911 Ala. Acts, p. 330.

[6] In 1965 the Alabama Legislature enacted Act No. 823, 1965 Ala. Acts, p. 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the city of Mobile belatedly submitted Act No. 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act No. 823 is in abeyance.

only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

II

Although required by general principles of judicial administration to do so, *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105; *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 79 Stat. 437, as amended, 42 U. S. C. § 1973.

Assuming, for present purposes, that there exists a private right of action to enforce this statutory provision,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative his-

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[7] According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. *Id.*, at 98–99. It is reasonable to suppose that an even larger majority of other municipalities did so.

[8] Cf. *Allen* v. *State Board of Elections*, 393 U. S. 544. But see *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11; *Touche Ross & Co.* v. *Redington*, 442 U. S. 560.

[9] Section 1 of the Fifteenth Amendment provides:

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

tory of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 208 (1965).

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment of the Court of Appeals with respect to the Fifteenth Amendment.

III

The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough*, 110 U. S. 651, 665; *Neal* v. *Delaware*, 103 U. S. 370, 389–390; *United States* v. *Cruikshank*, 92 U. S. 542, 555–556; *United States* v. *Reese*, 92 U. S. 214. The Amend-

ment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *Id.*, at 217–218.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. In *Guinn* v. *United States*, 238 U. S. 347, this Court struck down a "grandfather" clause in a state constitution exempting from the requirement that voters be literate any person or the descendants of any person who had been entitled to vote before January 1, 1866. It was asserted by way of defense that the provision was immune from successful challenge, since a law could not be found unconstitutional either "by attributing to the legislative authority an occult motive," or "because of conclusions concerning its operation in practical execution and resulting discrimination arising . . . from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote." *Id.*, at 359. Despite this argument, the Court did not hesitate to hold the grandfather clause unconstitutional, because it was not "possible to discover any basis in reason for the standard thus fixed other than the purpose" to circumvent the Fifteenth Amendment. *Id.*, at 365.

The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the

municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.[10]

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place of origin." *Id.*, at 56, 58.[11] See also *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 268, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for

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[10] The Court has repeatedly cited *Gomillion* v. *Lightfoot* for the principle that an invidious *purpose* must be adduced to support a claim of unconstitutionality. See *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265, 266; *Washington* v. *Davis*, 426 U. S. 229, 240.

[11] MR. JUSTICE MARSHALL has elsewhere described the fair import of the *Gomillion* and *Wright* cases: "In the two Fifteenth Amendment redistricting cases, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), and *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), the Court suggested that legislative purpose alone is determinative, although language in both cases may be isolated that seems to approve some inquiry into effect insofar as it elucidates purpose." *Beer* v. *United States*, 425 U. S. 130, 148, n. 4 (dissenting opinion).

The Court in the *Wright* case also rejected claims made under the Equal Protection Clause of the Fourteenth Amendment. See *infra*, at 67.

example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgment of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed] and enforce[d] the discrimination against Negroes, practiced by a party." 321 U. S., at 664.

Terry v. *Adams*, *supra*, posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only characteristic, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" the patent dis-

crimination practiced by a nominally private organization. *Terry* v. *Adams*, *supra*, at 473 (opinion of Frankfurter, J.).

The answer to the appellees' argument is that, as the District Court expressly found, their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hindrance," the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

A

The claim that at-large electoral schemes unconstitutionally deny to some persons the equal protection of the laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Sims*, 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-

take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, *supra*; *Kilgarlin* v. *Hill*, 386 U. S. 120; *Burns* v. *Richardson*, 384 U. S. 73; *Fortson* v. *Dorsey*, 379 U. S. 433.[12] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*, *supra*. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester*, *supra*, at 765–766; *Whitcomb* v. *Chavis*, 403 U. S., at 149–150. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination," *id.*, at 149.

This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment. See *Washington* v. *Davis*, 426 U. S. 229;

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[12] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U. S. 315, 333." *Connor* v. *Finch*, 431 U. S. 407, 415.

Arlington Heights v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256. The Court explicitly indicated in *Washington* v. *Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Indeed, the Court's opinion in that case viewed *Wright* v. *Rockefeller*, 376 U. S. 52, as an apt illustration of the principle that an illicit purpose must be proved before a constitutional violation can be found. The Court said:

> "The rule is the same in other contexts. *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.' *Id.*, at 56, 58. The dissenters were in agreement that the issue was whether the 'boundaries . . . were purposefully drawn on racial lines.' *Id.*, at 67." *Washington* v. *Davis*, *supra*, at 240.

More recently, in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*, the Court again relied on *Wright* v. *Rockefeller* to illustrate the principle that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U. S., at 265. Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution, the fact is that such a view is not supported by any decision of

this Court.[13] More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination. *Washington* v. *Davis*, *supra* (employment); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra* (zoning); *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 208 (public schools); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (jury selection).

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group. That case was *White* v. *Regester*. There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support findings that the political processes lead-

[13] The dissenting opinion of MR. JUSTICE MARSHALL reads the Court's opinion in *Fortson* v. *Dorsey*, 379 U. S. 433, to say that a claim of vote dilution under the Equal Protection Clause could rest on either discriminatory purpose or effect. *Post*, at 108. In fact, the Court explicitly reserved this question and expressed no view concerning it. That case involved solely a claim, which the Court rejected, that a state legislative apportionment statute creating some multimember districts was constitutionally infirm on its face. Although the Court recognized that "designedly or otherwise," multimember districting schemes might, under the circumstances of a particular case, minimize the voting strength of a racial group, an issue as to the constitutionality of such an arrangement "[was] not presented by the record," and "'our holding ha[d] no bearing on that wholly separate question.'" 379 U. S., at 439.

The phrase "designedly or otherwise" in which this dissenting opinion places so much stock, was repeated, also in dictum, in *Burns* v. *Richardson*, 384 U. S. 73, 88. But the constitutional challenge to the multimember constituencies failed in that case because the plaintiffs demonstrated neither discriminatory purpose nor effect. *Id.*, at 88–90, and nn. 15 and 16.

ing to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766, 767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. *Id.*, at 768 (footnote omitted).

White v. *Regester* is thus consistent with "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," *Washington* v. *Davis*, 426 U. S., at 240. The Court stated the constitutional question in *White* to be whether the "multimember districts [were] *being used invidiously* to cancel out or minimize the voting strength of racial groups," 412 U. S., at 765 (emphasis added), strongly indicating that only a purposeful dilution of the plaintiffs' vote would offend the Equal Protection Clause.[14]

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[14] In *Gaffney* v. *Cummings*, 412 U. S. 735, a case decided the same day as *White* v. *Regester*, the Court interpreted both *White* and the earlier vote dilution cases as turning on the existence of discriminatory purpose:

"State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are *employed* 'to minimize or cancel out the voting strength of racial or political elements of

Moreover, much of the evidence on which the Court relied in that case was relevant only for the reason that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264–265. Of course, "[t]he impact of the official action—whether it 'bears more heavily on one race than another,' *Washington* v. *Davis, supra,* at 242—may provide an important starting point." *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266. But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. See *ibid.; Washington* v. *Davis, supra,* at 242.

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive, and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[15] But even making this assumption, it is clear that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful devic[e] to further racial . . . discrimination." *Whitcomb* v. *Chavis,* 403 U. S., at 149.

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the voting population.' *Fortson* v. *Dorsey,* 379 U. S. 433, 439 (1965). See *White* v. *Regester, post,* p. 755; *Whitcomb* v. *Chavis,* 403 U. S. 124 (1971); *Abate* v. *Mundt,* 403 U. S., at 184, n. 2; *Burns* v. *Richardson,* 384 U. S., at 88–89." 412 U. S., at 751 (emphasis added).

[15] See *Wise* v. *Lipscomb,* 437 U. S. 535, 550 (opinion of REHNQUIST, J.). It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government. See, *e. g.,* E. Banfield & J. Wilson, City Politics 151 (1963). Cf. M. Seasongood, Local Government in the United States (1933); L. Steffens, The Shame of the Cities (1904).

The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U. S. 229, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient. See 485 F. 2d, at 1304–1305, and n. 16.[16]

In light of the criteria identified in *Zimmer*, the District Court based its conclusion of unconstitutionality primarily on the fact that no Negro had ever been elected to the City Commission, apparently because of the pervasiveness of racially polarized voting in Mobile. The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons. On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[17]

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[16] This Court affirmed the judgment of the Court of Appeals in *Zimmer* v. *McKeithen* on grounds other than those relied on by that court and explicitly "without approval of the constitutional views expressed by the Court of Appeals." *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638 (*per curiam*).

[17] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' *Akins* v. *Texas*, 325 U. S. 398, 404, . . . to [the] present purpose to dilute the black vote as evidenced in this case. There

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination,[18] but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen, supra.* Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose

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is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes* [v. *School District No. 1, Denver Colo.*, 413 U. S. 189]." 423 F. Supp., at 398.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially exclusionary jury cases appears mistaken. Those cases typically have involved a consistent pattern of discrete official actions that demonstrated almost to a mathematical certainty that Negroes were being excluded from juries because of their race. See *Castaneda* v. *Partida*, 430 U. S. 482, 495–497, and n. 17; *Patton* v. *Mississippi*, 332 U. S. 463, 466–467; *Pierre* v. *Louisiana*, 306 U. S. 354, 359; *Norris* v. *Alabama*, 294 U. S. 587, 591.

If the District Court meant by its statement that the existence of the at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile. Alternatively, if the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S., at 279 (footnotes omitted).

[18] The Court of Appeals expressed the view that the District Court's finding of discrimination in light of the *Zimmer* criteria was "buttressed" by the fact that the Attorney General had interposed an objection under § 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d 238, 246 (CA5). See n. 6, *supra.*

had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis, supra,* and *Arlington Heights, supra.* Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation. *Whitcomb* v. *Chavis,* 403 U. S., at 160; see *Arlington Heights,* 429 U. S., at 266, and n. 15.[19]

Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, what-

[19] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

ever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.[20]

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester*, 412 U. S. 755. They are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.[21]

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[20] Among the difficulties with the District Court's view of the evidence was its failure to identify the state officials whose intent it considered relevant in assessing the invidiousness of Mobile's system of government. To the extent that the inquiry should properly focus on the state legislature, see n. 21, *infra*, the actions of unrelated governmental officials would be, of course, of questionable relevance.

[21] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have

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We turn finally to the arguments advanced in Part I of MR. JUSTICE MARSHALL's dissenting opinion. The theory of this dissenting opinion—a theory much more extreme than that espoused by the District Court or the Court of Appeals—appears to be that every "political group," or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers.[22] Moreover, a political group's "right" to have its candidates elected is said to be a "fundamental interest," the infringement of which may be established without proof that a State has acted with the purpose of impairing anybody's access to the political process. This dissenting opinion finds the "right" infringed in the present case because no Negro has been elected to the Mobile City Commission.

Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law. The Equal Protection Clause of the Fourteenth Amendment does not

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altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a Mayor and City Council with members elected from individual districts within the city. Whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

[22] The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical and social factors" indicating that the group in question is without political influence. *Post*, at 111–112, n. 7, 122–124. Putting to the side the evident fact that these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete political group that happens, for whatever reason, to elect fewer of its candidates than arithmetic indicates it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the "inequitable distribution of political influence." *Post*, at 122.

require proportional representation as an imperative of political organization. The entitlement that the dissenting opinion assumes to exist simply is not to be found in the Constitution of the United States.

It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 634, 638; *id.*, at 642–644 (concurring opinion). See also *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17, 30–32. But plainly "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.*, at 33. See *Lindsey* v. *Normet*, 405 U. S. 56, 74; *Dandridge* v. *Williams*, 397 U. S. 471, 485. Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from "the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy," *San Antonio Independent School Dist.* v. *Rodriguez*, *supra*, at 33.[23] MR. JUSTICE MARSHALL's dissenting opinion would discard these fixed principles in favor of a judicial inventiveness that would go "far toward making this Court a 'super-legislature.'" *Shapiro* v. *Thompson*, *supra*, at 655, 661 (Harlan, J., dissenting). We are not free to do so.

More than 100 years ago the Court unanimously held that "the Constitution of the United States does not confer the right of suffrage upon any one. . . ." *Minor* v. *Happersett*, 21 Wall. 162, 178. See *Lassiter* v. *Northampton Election Bd.*, 360 U. S., at 50–51. It is for the States "to determine the conditions under which the right of suffrage may be

[23] The presumption of constitutional validity that underlies the settled mode of reviewing legislation disappears, of course, if the law under consideration creates classes that, in a constitutional sense, are inherently "suspect." See *McLaughlin* v. *Florida*, 379 U. S. 184; *Strauder* v. *West Virginia*, 100 U. S. 303. Cf. *Lockport* v. *Citizens for Community Action*, 430 U. S. 259.

exercised . . . , absent of course the discrimination which the Constitution condemns," *ibid.* It is true, as the dissenting opinion states, that the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters. See *Dunn* v. *Blumstein*, 405 U. S. 330, 336; *Reynolds* v. *Sims*, 377 U. S., at 576. But this right to equal participation in the electoral process does not protect any "political group," however defined, from electoral defeat.[24]

The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person, one vote" principle of *Reynolds* v. *Sims*, *supra*, and its progeny.[25] Those cases established that the Equal Protection

[24] The basic fallacy in the dissenting opinion's theory is illustrated by analogy to a defendant's right under the Sixth and Fourteenth Amendments to a trial by a jury of his peers in a criminal case. See *Duncan* v. *Louisiana*, 391 U. S. 145. That right, expressly conferred by the Constitution, is certainly "fundamental" as that word is used in the dissenting opinion. Moreover, under the Equal Protection Clause, a defendant has a right to require that the State not exclude from the jury members of his race. See *Castaneda* v. *Partida*, 430 U. S., at 493. But "[f]airness in selection has never been held to require proportional representation of races upon a jury," *Akins* v. *Texas*, 325 U. S. 398, 403; nor has the defendant any "right to demand that members of his race be included," *Alexander* v. *Louisiana*, 405 U. S. 625, 628. The absence from a jury of persons belonging to racial or other cognizable groups offends the Constitution only "if it results from purposeful discrimination." *Castaneda* v. *Partida*, *supra*, at 493. See *Alexander* v. *Louisiana*, *supra*; see also *Washington* v. *Davis*, 426 U. S., at 239–240. Thus, the fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition. Likewise, the fact that the Equal Protection Clause confers a right to participate in elections on an equal basis with other qualified voters does not entail a right to have one's candidates prevail.

[25] The dissenting opinion also relies upon several decisions of this Court that have held constitutionally invalid various voter eligibility requirements: *Dunn* v. *Blumstein*, 405 U. S. 330 (length of residence requirement); *Evans* v. *Cornman*, 398 U. S. 419 (exclusion of residents of federal property); *Kramer* v. *Union School District*, 395 U. S. 621 (property

Clause guarantees the right of each voter to "have his vote weighted equally with those of all other citizens." 377 U. S., at 576. The Court recognized that a voter's right to "have an equally effective voice" in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts. There can be, of course, no claim that the "one person, one vote" principle has been violated in this case, because the city of Mobile is a unitary electoral district and the Commission elections are conducted at large. It is therefore obvious that nobody's vote has been "diluted" in the sense in which that word was used in the *Reynolds* case.

The dissenting opinion places an extraordinary interpretation on these decisions, an interpretation not justified by *Reynolds* v. *Sims* itself or by any other decision of this Court. It is, of course, true that the right of a person to vote on an equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.[26] And the Court's decisions hold squarely

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or status requirement); *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (poll tax requirement). But there is in this case no attack whatever upon any of the voter eligibilty requirements in Mobile. Nor do the cited cases contain implicit support for the position of the dissenting opinion. They stand simply for the proposition that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union School District*, *supra*, at 627. It is difficult to perceive any similarity between the excluded person's right to equal electoral participation in the cited cases, and the right asserted by the dissenting opinion in the present case, aside from the fact that they both in some way involve voting.

[26] It is difficult to perceive how the implications of the dissenting opin-

that they do not. See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 166–167; *id.*, at 179–180 (opinion concurring in judgment); *White* v. *Regester*, 412 U. S., at 765–766; *Whitcomb* v. *Chavis*, 403 U. S., at 149–150, 153–154, 156–157.

The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation. In *Whitcomb* v. *Chavis*, *supra*, the trial court had found that a multimember state legislative district had invidiously deprived Negroes and poor persons of rights guaranteed them by the Constitution, notwithstanding the absence of any evidence whatever of discrimination against them. Reversing the trial court, this Court said:

> "The District Court's holding, although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and repre-

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ion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of a "political group"? How large must a "group" be to be a "political group"? Can any "group" call itself a "political group"? If not, who is to say which "groups" are "political groups"? Can a qualified voter belong to more than one "political group"? Can there be more than one "political group" among white voters (*e. g.*, Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself.

sents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country." *Whitcomb* v. *Chavis*, *supra*, at 156–157 (footnotes omitted).

V

The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring in the result.

Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with MR. JUSTICE WHITE that, in this case, "the findings of the District Court amply support an inference of purposeful discrimination," *post*, at 103. I concur in the Court's judgment of reversal, however, because I believe that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion.

It seems to me that the city of Mobile, and its citizenry, have a substantial interest in maintaining the commission form of government that has been in effect there for nearly 70 years. The District Court recognized that its remedial order, changing the form of the city's government to a mayor-council system, "raised serious constitutional issues." 423 F. Supp. 384, 404 (SD Ala. 1976). Nonetheless, the court was "unable to see how the impermissibly unconstitutional dilution can be effectively corrected by any other approach." *Id.*, at 403.

The Court of Appeals approved the remedial measures adopted by the District Court and did so essentially on three factors: (1) this Court's preference for single-member districting in court-ordered legislative reapportionment, absent special circumstances, see, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407, 415 (1977); (2) appellants' noncooperation with the District Court's request for the submission of proposed municipal government plans that called for single-member districts for councilmen, under a mayor-council system of government; and (3) the temporary nature of the relief afforded by the District Court, the city or State being free to adopt a "constitutional replacement" for the District Court's plan in the future. 571 F. 2d 238, 247 (CA5 1978).

Contrary to the Court of Appeals, I believe that special circumstances are presented when a District Court "reapportions" a municipal government by altering its basic structures. See also the opinion of MR. JUSTICE STEWART, *ante*, at 70, and n. 15. See *Chapman* v. *Meier*, 420 U. S. 1, 20, n. 14 (1975); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U. S. 187 (1972). I also believe that the city's failure to submit a proposed plan to the District Court was excused by the fact that the only proposals the court was interested in receiving were variations on a mayor-council plan utilizing single-member districts. Finally, although the District Court's order may have been temporary, it was unlikely that the courts below would have approved any attempt by Mobile to return to the commission form of government. And even

a temporary alteration of a long-established form of municipal government is a drastic measure for a court to take.

Contrary to the District Court, I do not believe that, in order to remedy the unconstitutional vote dilution it found, it was necessary to convert Mobile's city government to a mayor-council system. In my view, the District Court at least should have considered alternative remedial orders that would have maintained some of the basic elements of the commission system Mobile long ago had selected—joint exercise of legislative and executive power, and citywide representation. In the first place, I see no reason for the court to have separated legislative and executive power in the city of Mobile by creating the office of mayor. In the second place, the court could have, and in my view should have, considered expanding the size of the Mobile City Commission and providing for the election of at least some commissioners at large. Alternative plans might have retained at-large elections for all commissioners while imposing district residency requirements that would have insured the election of a commission that was a cross section of all of Mobile's neighborhoods, or a plurality-win system that would have provided the potential for the effective use of single-shot voting by black voters. See *City of Rome* v. *United States*, *post*, at 184, n. 19. In failing to consider such alternative plans, it appears to me that the District Court was perhaps overly concerned with the elimination of at-large elections *per se*, rather than with structuring an electoral system that provided an opportunity for black voters in Mobile to participate in the city's government on an equal footing with whites.

In the past, this Court has emphasized that a district court's remedial power "may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education*, 402 U. S. 1, 16 (1971). I am not convinced that any violation of federal constitutional rights established by appellees required the District Court to dismantle Mobile's

commission form of government and replace it with a mayor-council system. Accordingly, I, too, would reverse the judgment of the Court of Appeals, and remand the case for reconsideration of an appropriate remedy.

MR. JUSTICE STEVENS, concurring in the judgment.

At issue in this case is the constitutionality of the city of Mobile's commission form of government. Black citizens in Mobile, who constitute a minority of that city's registered voters, challenged the at-large nature of the elections for the three positions of City Commissioner, contending that the system "dilutes" their votes in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. While I agree with MR. JUSTICE STEWART that no violation of respondents' constitutional rights has been demonstrated, my analysis of the issue proceeds along somewhat different lines.

In my view, there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community. That distinction divides so-called vote dilution practices into two different categories "governed by entirely different constitutional considerations," see *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (Harlan, J., concurring).

In the first category are practices such as poll taxes or literacy tests that deny individuals access to the ballot. Districting practices that make an individual's vote in a heavily populated district less significant than an individual's vote in a smaller district also belong in that category. See *Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533.[1] Such

[1] In *Reynolds* v. *Sims*, the Court quoted Mr. Justice Douglas' statement that the right to vote "includes the right to have the vote counted at full value without dilution or discount . . . ," 377 U. S., at 555, n. 29, as well as the comment in *Wesberry* v. *Sanders*, 376 U. S. 1, 8, that " 'one

practices must be tested by the strictest of constitutional standards, whether challenged under the Fifteenth Amendment or under the Equal Protection Clause of the Fourteenth Amendment. See, *e. g., Dunn* v. *Blumstein*, 405 U. S. 330, 337.

This case does not fit within the first category. The District Court found that black citizens in Mobile "register and vote without hindrance" [2] and there is no claim that any individual's vote is worth less than any other's. Rather, this case draws into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group. Although I am satisfied that such a structure may be challenged under the Fifteenth Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment,[3] I believe that under

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man's vote in a congressional election is to be worth as much as another's.'" 377 U. S., at 559.

[2] This finding distinguishes this case from *White* v. *Regester*, 412 U. S. 755. In *White* the Court held that, in order to establish a Fourteenth Amendment violation, a group alleging vote dilution must

"produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 766.

The Court affirmed a judgment in favor of black and Mexican-American voters on the basis of the District Court's express findings that black voters had been "'effectively excluded from participation in the Democratic primary selection process,'" *id.*, at 767, and that "'. . . cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation ha[d] operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.'" *Id.*, at 768.

[3] Thus, I disagree with MR. JUSTICE STEWART's conclusion for the plurality that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar. *Ante*, at 65. I also find it difficult to understand why, given this position, he reaches out to decide that discriminatory purpose must be demonstrated in a proper Fifteenth Amendment case. *Ante*, at 61–64.

either provision it must be judged by a standard that allows the political process to function effectively.

My conclusion that the Fifteenth Amendment applies to a case such as this rests on this Court's opinion in *Gomillion* v. *Lightfoot*, 364 U. S. 339. That case established that the Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the States' power to draw political boundaries. Although *Gomillion* involved a districting structure that completely excluded the members of one race from participation in the city's elections,[4] it does not stand for the proposition that no racial group can prevail on a Fifteenth Amendment claim unless it proves that an electoral system has the effect of making its members' right to vote, in MR. JUSTICE MARSHALL's words, "nothing more than the right to cast meaningless ballots." *Post*, at 104. I agree with MR. JUSTICE MARSHALL that the Fifteenth Amendment need not and should not be so narrowly construed. I do not agree, however, with his view that every "showing of discriminatory impact" on a historically and socially disadvan-

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[4] "The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords. When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment. In no case involving unequal weight in voting distribution that has come before the Court did the decision sanction a differentiation on racial lines whereby approval was given to unequivocal withdrawal of the vote solely from colored citizens.

. . . . . .

"According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries. While in form this is merely an act redefining metes and bounds, if the allegations are established, the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." 364 U. S., at 346, 347.

taged racial group, *post*, at 104, 111, n. 7, is sufficient to invalidate a districting plan.[5]

Neither *Gomillion* nor any other case decided by this Court establishes a constitutional right to proportional representation for racial minorities.[6] What *Gomillion* holds is that a sufficiently "uncouth" or irrational racial gerrymander violates the Fifteenth Amendment. As Mr. Justice Whittaker's concurrence in that case demonstrates, the same result is compelled by the Equal Protection Clause of the Fourteenth Amendment. See 364 U. S., at 349. The fact that the "gerrymander" condemned in *Gomillion* was equally vulnerable under both Amendments indicates that the essential holding of that case is applicable, not merely to gerrymanders directed against racial minorities, but to those aimed at religious, ethnic, economic, and political groups as well. Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering—not just to racial gerrymandering. See *Cousins* v. *City Council*

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[5] I also disagree with MR. JUSTICE MARSHALL to the extent that he implies that the votes cast in an at-large election by members of a racial minority can never be anything more than "meaningless ballots." I have no doubt that analyses of Presidential, senatorial and other statewide elections would demonstrate that ethnic and racial minorities have often had a critical impact on the choice of candidates and the outcome of elections. There is no reason to believe that the same political forces cannot operate in smaller election districts regardless of the depth of conviction or emotion that may separate the partisans of different points of view.

[6] And this is true regardless of the apparent need of a particular group for proportional representation because of its historically disadvantaged position in the community. See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893. This does not mean, of course, that a legislature is constitutionally prohibited from according some measure of proportional representation to a minority group, see *United Jewish Organizations* v. *Carey*, 430 U. S. 144.

of Chicago, 466 F. 2d 830, 848–852 (CA7 1972) (Stevens, J., dissenting), cert. denied, 409 U. S. 893.[7]

This conclusion follows, I believe, from the very nature of a gerrymander. By definition, gerrymandering involves drawing district boundaries (or using multimember districts or at-large elections) in order to maximize the voting strength of those loyal to the dominant political faction and to minimize the strength of those opposed to it.[8] 466 F. 2d, at 847. In seeking the desired result, legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way. The success of the gerrymander from the legislators' point of view, as well as its impact on the

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[7] This view is consistent with the Court's Fourteenth Amendment cases in which it has indicated that attacks on apportionment schemes on racial, political, or economic grounds should all be judged by the same constitutional standard. See, *e. g.*, *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (districts that are "conceived or operated as purposeful devices to further racial *or economic* discrimination" are prohibited by the Fourteenth Amendment) (emphasis supplied); *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (an apportionment scheme would be invalid under the Fourteenth Amendment if it "operate[d] to minimize or cancel out the voting strength of racial *or political* elements of the voting population") (emphasis supplied).

[8] Gerrymanders may also be used to preserve the current balance of power between political parties, see, *e. g.*, *Gaffney* v. *Cummings*, 412 U. S. 735, or to preserve the safe districts of incumbents, cf. *Wright* v. *Rockefeller*, 376 U. S. 52. In *Gaffney* the Court pointed out: "[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences." 412 U. S., at 753.

disadvantaged group, depends on the accuracy of those predictions.

A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics.[9] In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.

From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers—specifically the number of persons who will vote in the same way. In the long run there is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics.[10]

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[9] Thus, for example, there is little qualitative difference between the motivation behind a religious gerrymander designed to gain votes on the abortion issue and a racial gerrymander designed to gain votes on an economic issue.

[10] As Mr. Justice Douglas wrote in his dissent in *Wright* v. *Rockefeller*:

"Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B

But if the Constitution were interpreted to give more favorable treatment to a racial minority alleging an unconstitutional impairment of its political strength than it gives to other identifiable groups making the same claim, such an incentive would inevitably result.

My conclusion that the same standard should be applied to racial groups as is applied to other groups leads me also to

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must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders*, 372 U. S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.

. . . . .

"When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." 376 U. S., at 66–67.

See also my dissent in *Cousins, supra:*

"In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." 466 F. 2d, at 852.

conclude that the standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage. Difficult as the issues engendered by *Baker* v. *Carr*, 369 U. S. 186, may have been, nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups.

In its prior cases the Court has phrased the standard as being whether the districting practices in question "unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis*, 403 U. S. 124, 144. In *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, the Fifth Circuit attempted to outline the types of proof that would satisfy this rather amorphous test. Today, the plurality rejects the *Zimmer* analysis, holding that the primary, if not the sole, focus of the inquiry must be on the intent of the political body responsible for making the districting decision. While I agree that the *Zimmer* analysis should be rejected, I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers.

In my view, the proper standard is suggested by three characteristics of the gerrymander condemned in *Gomillion:* (1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. See *United States* v. *O'Brien*, 391 U. S.

367, 384.[11] In this case, if the commission form of government in Mobile were extraordinary, or if it were nothing more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it.

Conversely, I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention.[12] The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for drawing political boundaries is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the voting populace. Indeed, the same "group interest" may simultaneously support and oppose a particular boundary change.[13] The standard cannot, therefore, be so

[11] In *O'Brien* the Court described *Gomillion* as standing "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."

[12] "It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington* v. *Davis*, 426 U. S. 229, 253 (STEVENS, J., concurring).

[13] For example, if 55% of the voters in an area comprising two districts belong to group A, their interests in electing two representatives would be best served by evenly dividing the voters in two districts, but their inter-

strict that any evidence of a purpose to disadvantage a bloc of voters will justify a finding of "invidious discrimination"; otherwise, the facts of political life would deny legislatures the right to perform the districting function. Accordingly, a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.

The decision to retain the commission form of government in Mobile, Ala., is such a decision. I am persuaded that some support for its retention comes, directly or indirectly, from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government. I deplore that motivation and wish that neither it nor any other irrational prejudice played any part in our political processes. But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.

As MR. JUSTICE STEWART points out, Mobile's basic election system is the same as that followed by literally thousands of municipalities and other governmental units throughout the Nation. *Ante*, at 60.[14] The fact that these at-large systems

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ests in making sure that they elect at least one representative would be served by concentrating a larger majority in one district. See *Cousins* v. *City Council of Chicago*, 466 F. 2d, at 855, n. 30 (Stevens, J., dissenting). See also *Wright* v. *Rockefeller*, 376 U. S. 52, where the maintenance of racially separate congressional districts was challenged by one group of blacks and supported by another group having the dominant power in the black-controlled district.

[14] I emphasize this point because in my opinion there is a significant difference between a statewide legislative plan that "happens" to use multimember districts only in those areas where they disadvantage discrete minority groups and the use of a generally acceptable municipal form of government that involves the election of commissioners by the

characteristically place one or more minority groups at a significant disadvantage in the struggle for political power cannot invalidate all such systems. See *Whitcomb* v. *Chavis*, 403 U. S., at 156–160. Nor can it be the law that such systems are valid when there is no evidence that they were instituted or maintained for discriminatory reasons, but that they may be selectively condemned on the basis of the subjective motivation of some of their supporters. A contrary view "would spawn endless litigation concerning the multi-member district systems now widely employed in this country," *id.*, at 157, and would entangle the judiciary in a voracious political thicket.[15]

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voters at large. While it is manifest that there is a substantial neutral justification for a municipality's choice of a commission form of government, it is by no means obvious that an occasional multimember district in a State which typically uses single-member districts can be adequately explained on neutral grounds. Nothing in the Court's opinion in *White* v. *Regester*, 412 U. S. 755, describes any purported neutral explanation for the multimember districts in Bexar and Dallas Counties. In this connection, it should be remembered that *Kilgarlin* v. *Hill*, 386 U. S. 120, did not uphold the constitutionality of a "crazy quilt" of single-member and multimember districts; rather, in that case this Court merely upheld the findings by the District Court that the plaintiffs had failed to prove their allegations that the districting plan constituted such a crazy quilt.

[15] Rejection of Mr. Justice Frankfurter's views in the specific controversy presented by *Baker* v. *Carr*, 369 U. S. 186, does not refute the basic wisdom of his call for judicially manageable standards in this area: "Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." *Id.*, at 267 (Frankfurter, J., dissenting).

In sum, I believe we must accept the choice to retain Mobile's commission form of government as constitutionally permissible even though that choice may well be the product of mixed motivation, some of which is invidious. For these reasons I concur in the judgment of reversal.

MR. JUSTICE BRENNAN, dissenting.*

I dissent because I agree with MR. JUSTICE MARSHALL that proof of discriminatory impact is sufficient in these cases. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with MR. JUSTICE MARSHALL and MR. JUSTICE WHITE that the appellees have clearly met that burden.

MR. JUSTICE WHITE, dissenting.

In *White* v. *Regester*, 412 U. S. 755 (1973), this Court unanimously held the use of multimember districts for the election of state legislators in two counties in Texas violated the Equal Protection Clause of the Fourteenth Amendment because, based on a careful assessment of the totality of the circumstances, they were found to exclude Negroes and Mexican-Americans from effective participation in the political processes in the counties. Without questioning the vitality of *White* v. *Regester* and our other decisions dealing with challenges to multimember districts by racial or ethnic groups, the Court today inexplicably rejects a similar holding based on meticulous factual findings and scrupulous application of the principles of these cases by both the District Court and the Court of Appeals. The Court's decision is flatly inconsistent with *White* v. *Regester* and it cannot be understood to flow from our recognition in *Washington* v. *Davis*, 426 U. S. 229 (1976), that the Equal Protection Clause forbids only purposeful discrimination. Both the District Court and the

*[This opinion applies also to No. 78-357, *Williams et al.* v. *Brown et al.*, *post*, p. 236.]

Court of Appeals properly found that an invidious discriminatory purpose could be inferred from the totality of facts in this case. The Court's cryptic rejection of their conclusions ignores the principles that an invidious discriminatory purpose can be inferred from objective factors of the kind relied on in *White* v. *Regester* and that the trial courts are in a special position to make such intensely local appraisals.

I

Prior to our decision in *White* v. *Regester*, we upheld a number of multimember districting schemes against constitutional challenges, but we consistently recognized that such apportionment schemes could constitute invidious discrimination "where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971), quoting from *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). In *Whitcomb* v. *Chavis*, *supra*, we noted that the fact that the number of members of a particular group who were legislators was not in proportion to the population of the group did not prove invidious discrimination absent evidence and findings that the members of the group had less opportunity than did other persons "to participate in the political processes and to elect legislators of their choice." 403 U. S., at 149.

Relying on this principle, in *White* v. *Regester* we unanimously upheld a District Court's conclusion that the use of multimember districts in Dallas and Bexar Counties in Texas violated the Equal Protection Clause in the face of findings that they excluded Negroes and Mexican-Americans from effective participation in the political processes. With respect to the exclusion of Negroes in Dallas County, "the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic

processes." 412 U. S., at 766. The District Court also referred to Texas' majority vote requirement and "place" rule, "neither in themselves improper nor invidious," but which "enhanced the opportunity for racial discrimination" by reducing legislative elections from the multimember district to "a head-to-head contest for each position." *Ibid.* We deemed more fundamental the District Court's findings that only two Negro state representatives had been elected from Dallas County since Reconstruction and that these were the only two Negroes ever slated by an organization that effectively controlled Democratic Party candidate slating. *Id.*, at 766–767. We also noted the District Court's findings that the Democratic Party slating organization was insensitive to the needs and aspirations of the Negro community and that at times it had employed racial campaign tactics to defeat candidates supported by the black community. Based on this evidence, the District Court concluded that the black community generally was "not permitted to enter into the political process in a reliable and meaningful manner." *Id.*, at 767. We held that "[t]hese findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them." *Ibid.*

With respect to the exclusion of Mexican-Americans from the political process in Bexar County, the District Court referred to the continuing effects of a long history of invidious discrimination against Mexican-Americans in education, employment, economics, health, politics, and other fields. *Id.*, at 768. The impact of this discrimination, coupled with a cultural and language barrier, made Mexican-American participation in the political life of Bexar County extremely difficult. Only five Mexican-Americans had represented Bexar County in the Texas Legislature since 1880, and the county's legislative delegation "was insufficiently responsive to Mexican-American interests." *Id.*, at 769. "Based on the totality of the circumstances, the District Court evolved its

ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county." *Ibid.* "[F]rom its own special vantage point" the District Court concluded that the multimember district invidiously excluded Mexican-Americans from effective participation in the election of state representatives. We affirmed, noting that we were "not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." *Id.*, at 769–770.

II

In the instant case the District Court and the Court of Appeals faithfully applied the principles of *White* v. *Regester* in assessing whether the maintenance of a system of at-large elections for the selection of Mobile City Commissioners denied Mobile Negroes their Fourteenth and Fifteenth Amendment rights. Scrupulously adhering to our admonition that "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question," *id.*, at 766, the District Court conducted a detailed factual inquiry into the openness of the candidate selection process to blacks. The court noted that "Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965" and that "[t]he pervasive effects of past discrimination still substantially affec[t] black political participation." 423 F. Supp. 384, 387 (SD Ala. 1976). Although the District Court noted that "[s]ince the Voting Rights Act of 1965, blacks register and vote without hindrance," the court found that "local political processes are not equally open" to blacks. Despite the fact that Negroes constitute more than 35% of the population of Mobile, no Negro has ever been elected to the Mobile

City Commission. The plaintiffs introduced extensive evidence of severe racial polarization in voting patterns during the 1960's and 1970's with "white voting for white and black for black if a white is opposed to a black," resulting in the defeat of the black candidate or, if two whites are running, the defeat of the white candidate most identified with blacks. *Id.*, at 388. Regression analyses covering every City Commission race in 1965, 1969, and 1973, both the primary and general election of the county commission in 1968 and 1972, selected school board races in 1962, 1966, 1970, 1972, and 1974, city referendums in 1963 and 1973, and a countywide legislative race in 1969 confirmed the existence of severe bloc voting. *Id.*, at 388–389. Nearly every active candidate for public office testified that because of racial polarization "it is highly unlikely that anytime in the foreseeable future, under the at-large system, . . . a black can be elected against a white." *Id.*, at 388. After single-member districts were created in Mobile County for state legislative elections, "three blacks of the present fourteen member Mobile County delegation have been elected." *Id.*, at 389. Based on the foregoing evidence, the District Court found "that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." *Ibid.*

The District Court also reviewed extensive evidence that the City Commissioners elected under the at-large system have not been responsive to the needs of the Negro community. The court found that city officials have been unresponsive to the interests of Mobile Negroes in municipal employment, appointments to boards and committees, and the provision of municipal services in part because of "the political fear of a white backlash vote when black citizens' needs are at stake." *Id.*, at 392. The court also found that there is no clear-cut state policy preference for at-large elections and that past dis-

crimination affecting the ability of Negroes to register and to vote "has helped preclude the effective participation of blacks in the election system today." *Id.*, at 393. The adverse impact of the at-large election system on minorities was found to be enhanced by the large size of the citywide election district, the majority vote requirement, the provision that candidates run for positions by place or number, and the lack of any provision for at-large candidates to run from particular geographical subdistricts.

After concluding its extensive findings of fact, the District Court addressed the question of the effect of *Washington* v. *Davis*, 426 U. S. 229 (1976), on the *White* v. *Regester* standards. The court concluded that the requirement that a facially neutral statute involve purposeful discrimination before a violation of the Equal Protection Clause can be established was not inconsistent with *White* v. *Regester* in light of the recognition in *Washington* v. *Davis, supra*, at 241–242, that the discriminatory purpose may often be inferred from the totality of the relevant facts, including the discriminatory impact of the statute. 423 F. Supp., at 398. After noting that "whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected," *id.*, at 397, the District Court concluded that there was "a present purpose to dilute the black vote . . . resulting from intentional state legislative *inaction*. . . ." *Id.*, at 398. Based on an "exhaustive analysis of the evidence in the record," the court held that "[t]he plaintiffs have met the burden cast in *White* and *Whitcomb*," and that "the multi-member at-large election of Mobile City Commissioners . . . results in an unconstitutional dilution of black voting strength." *Id.*, at 402.

The Court of Appeals affirmed the District Court's judgment in one of four consolidated "dilution" cases decided on the same day. *Bolden* v. *Mobile*, 571 F. 2d 238 (CA5 1978); *Nevett* v. *Sides*, 571 F. 2d 209 (CA5 1978) (*Nevett II*); *Blacks United for Lasting Leadership, Inc.* v. *Shreveport*, 571

F. 2d 248 (CA5 1978); *Thomasville Branch of NAACP* v. *Thomas County, Georgia*, 571 F. 2d 257 (CA5 1978). In the lead case of *Nevett II*, *supra*, the Court of Appeals held that under *Washington* v. *Davis*, *supra*, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977), "a showing of racially motivated discrimination is a necessary element" for a successful claim of unconstitutional voting dilution under either the Fourteenth or Fifteenth Amendment. 571 F. 2d, at 219. The court concluded that the standards for proving unconstitutional voting dilution outlined in *White* v. *Regester* were consistent with the requirement that purposeful discrimination be shown because they focus on factors that go beyond a simple showing that minorities are not represented in proportion to their numbers in the general population. 571 F. 2d, at 219–220, n. 13, 222–224.

In its decision in the instant case the Court of Appeals reviewed the District Court's findings of fact, found them not to be clearly erroneous and held that they "compel the inference that [Mobile's at-large] system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 . . . (1977); *Washington* v. *Davis*, 426 U. S. 229 . . . (1976), and the fifteenth amendment, *Wright* v. *Rockefeller*, 376 U. S. 52 . . . (1964)." *Id.*, at 245. The court observed that the District Court's "finding that the legislature was acutely conscious of the racial consequences of its districting policies," coupled with the attempt to assign different functions to each of the three City Commissioners "to lock in the at-large feature of the scheme," constituted "direct evidence of the intent behind the maintenance of the at-large plan." *Id.*, at 246. The Court of Appeals concluded that "the district court has properly conducted the 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available' that a court must undertake in '[d]etermining whether invidious dis-

criminatory purpose was a motivating factor' in the maintenance or enactment of a districting plan." *Ibid.*, quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp., supra,* at 266.

III

A plurality of the Court today agrees with the courts below that maintenance of Mobile's at-large system for election of City Commissioners violates the Fourteenth and Fifteenth Amendments only if it is motivated by a racially discriminatory purpose. The plurality also apparently reaffirms the vitality of *White* v. *Regester* and *Whitcomb* v. *Chavis,* which established the standards for determining whether at-large election systems are unconstitutionally discriminatory. The plurality nonetheless casts aside the meticulous application of the principles of these cases by both the District Court and the Court of Appeals by concluding that the evidence they relied upon "fell far short of showing" purposeful discrimination.

The plurality erroneously suggests that the District Court erred by considering the factors articulated by the Court of Appeals in *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (CA5 1973), to determine whether purposeful discrimination has been shown. This remarkable suggestion ignores the facts that *Zimmer* articulated the very factors deemed relevant by *White* v. *Regester* and *Whitcomb* v. *Chavis*—a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, the lack of any provision for at-large candidates to run from particular geographical subdistricts—and that both the District Court and the Court of Appeals considered these factors with the recognition that they are relevant only with respect to the question whether purposeful discrimination can be inferred.

Although the plurality does acknowledge that "the presence of the indicia relied on in *Zimmer* may afford some evidence

of a discriminatory purpose," it concludes that the evidence relied upon by the court below was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." The plurality apparently bases this conclusion on the fact that there are no official obstacles barring Negroes from registering, voting, and running for office, coupled with its conclusion that none of the factors relied upon by the courts below would alone be sufficient to support an inference of purposeful discrimination. The absence of official obstacles to registration, voting, and running for office heretofore has never been deemed to insulate an electoral system from attack under the Fourteenth and Fifteenth Amendments. In *White* v. *Regester*, 412 U. S. 755 (1973), there was no evidence that Negroes faced official obstacles to registration, voting, and running for office, yet we upheld a finding that they had been excluded from effective participation in the political process in violation of the Equal Protection Clause because a multimember districting scheme, in the context of racial voting at the polls, was being used invidiously to prevent Negroes from being elected to public office. In *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *Terry* v. *Adams*, 345 U. S. 461 (1953), we invalidated electoral systems under the Fifteenth Amendment not because they erected official obstacles in the path of Negroes registering, voting, or running for office, but because they were used effectively to deprive the Negro vote of any value. Thus, even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of City Commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process.

In conducting "an intensely local appraisal of the design and impact" of the at-large election scheme, *White* v. *Regester*, *supra*, at 769, the District Court's decision was fully consistent with our recognition in *Washington* v. *Davis*, 426 U. S., at 242, that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts,

including the fact, if it is true, that the law bears more heavily on one race than another." Although the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White* v. *Regester*, the plurality today rejects the inference of purposeful discrimination apparently because each of the factors relied upon by the courts below is alone insufficient to support the inference. The plurality states that the "fact [that Negro candidates have been defeated] alone does not work a constitutional deprivation," that evidence of the unresponsiveness of elected officials "is relevant only as the most tenuous and circumstantial evidence," that "the substantial history of official racial discrimination . . . [is] of limited help," and that the features of the electoral system that enhance the disadvantages faced by a voting minority "are far from proof that the at-large electoral scheme represents purposeful discrimination." By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting at the polls makes it impossible to elect a black commissioner under the at-large system, the plurality rejects the "totality of the circumstances" approach we endorsed in *White* v. *Regester*, *supra*, at 766–770, *Washington* v. *Davis*, *supra*, at 241–242, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 266, and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.

Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.

MR. JUSTICE MARSHALL, dissenting.*

The American ideal of political equality, conceived in the earliest days of our colonial existence and fostered by the

*[This opinion applies also to No. 78-357, *Williams et al.* v. *Brown et al.*, *post*, p. 236.]

egalitarian language of the Declaration of Independence, could not forever tolerate the limitation of the right to vote to white propertied males. Our Constitution has been amended six times in the movement toward a democracy for more than the few,[1] and this Court has interpreted the Fourteenth Amendment to provide that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). The Court's decision today is in a different spirit. Indeed, a plurality of the Court concludes that, in the absence of proof of intentional discrimination by the State, the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots.

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally diluted the Negro vote. These factual findings were upheld by the Court of Appeals, and the plurality does not question them. Instead, the plurality concludes that districting schemes do not violate the Equal Protection Clause unless it is proved that they were enacted or maintained for the purpose of minimizing or canceling out the voting potential of a racial minority. The plurality would require plaintiffs in vote-dilution cases to meet the stringent burden of establishing discriminatory intent within the meaning of *Washington* v. *Davis*, 426 U. S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); and *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979). In my view, our vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington* v. *Davis*, *supra*, and its progeny. Furthermore, an intent re-

[1] U. S. Const., Amdts. 15, 17, 19, 23, 24, 26.

quirement is inconsistent with the protection against denial or abridgment of the vote on account of race embodied in the Fifteenth Amendment and in § 2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973.[2] Even if, however, proof of discriminatory intent were necessary to support a vote-dilution claim, I would impose upon the plaintiffs a standard of proof less rigid than that provided by *Personnel Administrator of Mass.* v. *Feeney, supra.*

I

The Court does not dispute the proposition that multimember districting can have the effect of submerging electoral minorities and overrepresenting electoral majorities.[3] It is

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[2] I agree with the plurality, see *ante,* at 60–61, that the prohibition on denial or infringement of the right to vote contained in § 2 of the Voting Rights Act, 42 U. S. C. § 1973, contains the same standard as the Fifteenth Amendment. I disagree with the plurality's construction of that Amendment, however. See Part II, *infra.*

[3] The Court does not quarrel with the generalization that in many instances an electoral minority will fare worse under multimember districting than under single-member districting. Multimember districting greatly enhances the opportunity of the majority political faction to elect all representatives of the district. In contrast, if the multimember district is divided into several single-member districts, an electoral minority will have a better chance to elect a candidate of its choice, or at least to exert greater political influence. It is obvious that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting. See E. Banfield & J. Wilson, City Politics 91–96, 303–308 (1963); R. Dixon, Jr., Democratic Representation 12, 476–484, 503–527 (1968); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353, 358–360 (1976); Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553–555 (1973); Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1577–1579 (1970). Recent empirical studies have documented the validity of this generalization. See Berry & Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85, 113–122 (1979); Jones, The Impact of Local Election Systems on Black

for this reason that we developed a strong preference for single-member districting in court-ordered reapportionment plans. See *ante*, at 66, n. 12. Furthermore, and more important for present purposes, we decided a series of vote-dilution cases under the Fourteenth Amendment that were designed to protect electoral minorities from precisely the combination of electoral laws and historical and social factors found in the present cases.[4] In my view, the plurality's treatment of

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Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors, 12 Urb. Aff. Q. 223 (1976); Sloan, "Good Government" and the Politics of Race, 17 Soc. Prob. 161 (1969); The Impact of Municipal Reformism: A Symposium, 59 Soc. Sci. Q. 117 (1978).

The electoral schemes in these cases involve majority-vote, numbered-post, and staggered-term requirements. See *Bolden* v. *City of Mobile*, 423 F. Supp. 384, 386–387 (SD Ala. 1976); *Brown* v. *Moore*, 428 F. Supp. 1123, 1126–1127 (SD Ala. 1976). These electoral rules exacerbate the vote-dilutive effects of multimember districting. A requirement that a candidate must win by a majority of the vote forces a minority candidate who wins a plurality of votes in the general election to engage in a runoff election with his nearest competitor. If the competitor is a member of the dominant political faction, the minority candidate stands little chance of winning in the second election. A requirement that each candidate must run for a particular "place" or "post" creates head-to-head contests that minority candidates cannot survive. When a number of positions on a governmental body are to be chosen in the same election, members of a minority will increase the likelihood of election of a favorite candidate by voting only for him. If the remainder of the electorate splits its votes among the other candidates, the minority's candidate might well be elected by the minority's "single-shot voting." If the terms of the officeholders are staggered, the opportunity for single-shot voting is decreased. See *City of Rome* v. *United States*, *post*, p. 156; *Zimmer* v. *McKeithen*, 485 F. 2d 1297, 1305 (CA5 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636 (1976) (*per curiam*); Bonapfel, *supra;* Derfner, *supra*.

[4] The plurality notes that at-large elections were instituted in cities as a reform measure to correct corruption and inefficiency in municipal government, and suggests that it "may be a rash assumption" to apply vote-dilu-

these cases is fanciful. Although we have held that multi-member districts are not unconstitutional *per se*, see *ante*, at 66, there is simply no basis for the plurality's conclusion that

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tion concepts to a municipal government elected in that fashion. See *ante*, at 70, and n. 15. To the contrary, local governments are not exempt from the constitutional requirement to adopt representational districting ensuring that the votes of each citizen will have equal weight. *Avery* v. *Midland County*, 390 U. S. 474 (1968). Indeed, in *Beer* v. *United States*, 425 U. S. 130, 142, n. 14 (1976), and *Abate* v. *Mundt*, 403 U. S. 182, 184, n. 2 (1971), we assumed that our vote-dilution doctrine applied to local governments.

Furthermore, though municipalities must be accorded some discretion in arranging their affairs, see *Abate* v. *Mundt*, *supra*, there is all the more reason to scrutinize assertions that municipal, rather than state, multi-member districting dilutes the vote of an electoral minority:

"In statewide elections, it is possible that a large minority group in one multi-member district will be unable to elect any legislators, while in another multi-member district where the same group is a slight majority, they will elect the entire slate of legislators. Thus, the multi-member electoral system may hinder a group in one district but prove an advantage in another. In at-large elections in cities this is not possible. There is no way to balance out the discrimination against a particular minority group because the entire city is one huge election district. The minority's loss is absolute." Berry & Dye, *supra* n. 3, at 87.

That at-large elections were instituted as part of a "reform" movement in no way ameliorates these harsh effects. Moreover, in some instances the efficiency and breadth of perspective supposedly resulting from a reform structure of municipal government are achieved at a high cost. In a white-majority city in which severe racial bloc voting is common, the citywide view allegedly inculcated in city commissioners by at-large elections need not extend beyond the white community, and the efficiency of the commission form of government can be achieved simply by ignoring the concerns of the powerless minority.

It would be a mistake, then, to conclude that municipal at-large elections provide an inherently superior representational scheme. See also n. 3, *supra*; *Chapman* v. *Meier*, 372 F. Supp. 371, 388–392 (ND 1974) (three-judge court) (Bright, J., dissenting), rev'd, 420 U. S. 1 (1975). It goes without saying that a municipality has the freedom to design its own governance system. When that system is subjected to constitutional attack, however, the question is whether it was enacted or maintained with

under our prior cases proof of discriminatory intent is a necessary condition for the invalidation of multimember districting.

A

In *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), the first vote-dilution case to reach this Court, we stated explicitly that such a claim could rest on either discriminatory purpose or effect:

> "It might well be that, *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would *operate* to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.*, at 439 (emphasis added).

We reiterated these words in *Burns* v. *Richardson*, 384 U. S. 73 (1966), interpreted them as the correct test to apply to vote-dilution claims, and described the standard as one involving "invidious effect," *id.*, at 88. We then held that the plaintiffs had failed to meet their burden of proof:

> "[T]he demonstration that a particular multi-member scheme *effects an invidious result* must appear from evidence in the record. . . . That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting *was designed to have or had* the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.*, at 88–89 (emphasis added) (footnote omitted).

It could not be plainer that the Court in *Burns* considered

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a discriminatory purpose or has a discriminatory effect, not whether it comports with one or another of the competing notions about "good government."

discriminatory effect a sufficient condition for invalidating a multimember districting plan.

In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), we again repeated and applied the *Fortson* standard, 403 U. S., at 143, 144, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. *Id.*, at 150–155. The Court stressed that both the Democratic and Republican Parties had nominated Negroes, and several had been elected. Negro candidates lost only when their entire party slate went down to defeat. *Id.*, at 150, nn. 29–30, 152–153. In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns. *Id.*, at 152, n. 32, 155.[5]

More recently, in *White* v. *Regester*, 412 U. S. 755 (1973), we invalidated the challenged multimember districting plans because their characteristics, when combined with historical and social factors, had the discriminatory effect of denying

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[5] As the plurality notes, see *ante*, at 66, we indicated in *Whitcomb* v. *Chavis*, 403 U. S., at 149, that multimember districts were unconstitutional if they were "conceived or operated as purposeful devices to further racial or economic discrimination." The Court in *Whitcomb* did not, however, suggest that discriminatory purpose was a necessary condition for the invalidation of multimember districting. Our decision in *Whitcomb*, *supra*, at 143, acknowledged the continuing validity of the discriminatory-impact test adopted in *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965), and restated it as requiring plaintiffs to prove that "multi-member districts unconstitutionally *operate* to dilute or cancel the voting strength of racial or political elements." *Whitcomb*, *supra*, at 144 (emphasis added).

Abate v. *Mundt*, *supra*, decided the same day as *Whitcomb*, provides further evidence that *Whitcomb* did not alter the discriminatory-effects standard developed in earlier cases. In *Abate*, *supra*, at 184, n. 2, we rejected the argument that a multimember districting scheme had a vote-dilutive effect because "[p]etitioners . . . have not shown that these multimember districts, by themselves, operate to impair the voting strength of particular racial or political elements , . . , see *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966)."

the plaintiff Negroes and Mexican-Americans equal access to the political process. *Id.*, at 765–770. We stated that

> "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 765–766.

We held that the three-judge District Court had properly applied this standard in invalidating the multimember districting schemes in the Texas counties of Dallas and Bexar. The District Court had determined that the characteristics of the challenged electoral systems—multimember districts, a majority-vote requirement for nomination in a primary election, and a rule mandating that a candidate running for a position in a multimember district must run for a specified "place" on the ticket—though "neither in themselves improper nor invidious," reduced the electoral influence of Negroes and Mexican-Americans. *Id.*, at 766.[6] The District Court identified a number of social and historical factors that, when combined with the Texas electoral structure, resulted in vote dilution: (1) a history of official racial discrimination in Texas, including discrimination inhibiting the registration, casting of ballots, and political participation of Negroes; (2) proof that minorities were still suffering the effects of past discrimination; (3) a history of gross underrepresentation of minority interests; (4) proof of official insensitivity to the needs of minority citizens, whose votes were not needed by those in power; (5) the recent use of racial campaign tactics; and (6) a cultural and language barrier inhibiting the participation of

[6] See n. 3, *supra*.

Mexican-Americans. *Id.*, at 766–770. Based "on the totality of the circumstances," we affirmed the District Court's conclusion that the use of multimember districts excluded the plaintiffs "from effective participation in political life." *Id.*, at 769.[7]

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[7] *White* v. *Regester*, makes clear the distinction between the concepts of vote dilution and proportional representation. We have held that, in order to prove an allegation of vote dilution, the plaintiffs must show more than simply that they have been unable to elect candidates of their choice. See 412 U. S., at 765–766; *Whitcomb* v. *Chavis*, *supra*, at 149–150, 153. The Constitution, therefore, does not contain any requirement of proportional representation. Cf. *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977); *Gaffney* v. *Cummings*, 412 U. S. 735 (1973). When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials. In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.

Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. See n. 19, *infra*. In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.

The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors. At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.

We have also spoken of dilution of voting power in cases arising under the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.* Under § 5 of

It is apparent that a showing of discriminatory intent in the creation or maintenance of multimember districts is as unnecessary after *White* as it was under our earlier vote-dilution decisions. Under this line of cases, an electoral districting plan is invalid if it has the effect of affording an electoral minority "less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice," *id.*, at 766. It is also apparent that the Court in *White* considered equal access to the political process as meaning more than merely allowing the minority the opportunity to vote. *White* stands for the proposition that an electoral system may not relegate an electoral minority to political impotence by diminishing the importance of its vote. The plurality's approach requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to *White* and its predecessors.[8]

B

The plurality fails to apply the discriminatory-effect standard of *White* v. *Regester* because that approach conflicts with what the plurality takes to be an elementary principle of law. "[O]nly if there is purposeful discrimination," announces the

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that Act, 42 U. S. C. § 1973c, a state or local government covered by the Act may not enact new electoral procedures having the purpose or effect of denying or abridging the right to vote on account of race or color. We have interpreted this provision as prohibiting *any* retrogression in Negro voting power. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In some cases, we have labeled such retrogression a "dilution" of the minority vote. See, *e. g.*, *City of Rome* v. *United States*, *post*, p. 156. Vote dilution under § 5, then, involves a standard different from that applied in cases such as *White* v. *Regester*, *supra*, in which diminution of the vote violating the Fourteenth or Fifteenth Amendment is alleged.

[8] The plurality's approach is also inconsistent with our statement in *Dallas County* v. *Reese*, 421 U. S. 477, 480 (1975) (*per curiam*), that multimember districting violates the Equal Protection Clause if it "in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." See also *Chapman* v. *Meier*, 420 U. S., at 17.

plurality, "can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Ante*, at 66. That proposition is plainly overbroad. It fails to distinguish between two distinct lines of equal protection decisions: those involving suspect classifications, and those involving fundamental rights.

We have long recognized that under the Equal Protection Clause classifications based on race are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954), and are subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), regardless of whether they infringe on an independently protected constitutional right. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). Under *Washington* v. *Davis*, 426 U. S. 229 (1976), a showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications having a racially discriminatory impact. Perhaps because the plaintiffs in the present cases are Negro, the plurality assumes that their vote-dilution claims are premised on the suspect-classification branch of our equal protection cases, and that under *Washington* v. *Davis*, *supra*, they are required to prove discriminatory intent. That assumption fails to recognize that our vote-dilution decisions are rooted in a different strand of equal protection jurisprudence.

Under the Equal Protection Clause, if a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny" is required, *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 17 (1973), regardless of whether the infringement was intentional.[9] As I will explain, our cases

[9] See *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (right to travel); *Reynolds* v. *Sims*, 377 U. S. 533 (1964) (right to vote); *Douglas* v. *California*, 372 U. S. 353 (1963); and *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (right to fair access to criminal process). Under the rubric of the fundamental right of privacy, we have recognized that individuals have freedom from unjustified governmental interference with personal decisions involv-

recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution.[10] The plurality's erroneous conclusion to the contrary is the result of a failure to recognize the central distinction between *White* v. *Regester*, 412 U. S. 755 (1973), and *Washington* v. *Davis*, *supra:* the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement.[11]

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ing marriage, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978); *Loving* v. *Virginia*, 388 U. S. 1 (1967); procreation, *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942); contraception, *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); abortion, *Roe* v. *Wade*, 410 U. S. 113 (1973); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). See also *Moore* v. *East Cleveland*, 431 U. S. 494 (1977).

[10] As the present cases illustrate, a requirement of proof of discriminatory intent seriously jeopardizes the free exercise of the fundamental right to vote. Although the right to vote is indistinguishable for present purposes from the other fundamental rights our cases have recognized, see n. 9, *supra*, surely the plurality would not require proof of discriminatory purpose in those cases. The plurality fails to articulate why the right to vote should receive such singular treatment. Furthermore, the plurality refuses to recognize the disutility of requiring proof of discriminatory purpose in fundamental rights cases. For example, it would make no sense to require such a showing when the question is whether a state statute regulating abortion violates the right of personal choice recognized in *Roe* v. *Wade*, *supra*. The only logical inquiry is whether, regardless of the legislature's motive, the statute has the effect of infringing that right. See, *e. g.*, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52 (1976).

[11] Judge Wisdom of the Court of Appeals below recognized this distinction in a companion case, see *Nevett* v. *Sides*, 571 F. 2d 209, 231–234 (CA5 1978) (specially concurring opinion). See also Comment, Proof of

Nearly a century ago, the Court recognized the elementary proposition upon which our structure of civil rights is based: "[T]he political franchise of voting is . . . a fundamental political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). We reiterated that theme in our landmark decision in *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964), and stated that, because "the right of suffrage is a fundamental matter in a free and democratic society[,] . . . any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.* We realized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555. Accordingly, we recognized that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.*, at 576. See also *Wes-*

Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington* v. *Davis, Arlington Heights, Mt. Healthy*, and *Williamsburgh*, 12 Harv. Civ. Rights-Civ. Lib. L. Rev. 725, 758, n. 175 (1977); Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis*, 76 Mich. L. Rev. 694, 722–726 (1978); Comment, Constitutional Challenges to Gerrymanders, 45 U. Chi. L. Rev. 845, 869–877 (1978).

Washington v. *Davis*, 426 U. S. 229 (1976), involved alleged racial discrimination in public employment. By describing interests such as public employment as constitutional gratuities, I do not, of course, mean to suggest that their deprivation is immune from constitutional scrutiny. Indeed, our decisions have referred to the importance of employment, see *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 116 (1976); *Meyer* v. *Nebraska*, *supra*, at 399; *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), and we have explicitly recognized that in some circumstances public employment falls within the categories of liberty and property protected by the Fifth and Fourteenth Amendments, see, *e. g.*, *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Perry* v. *Sindermann*, 408 U. S. 593 (1972). The Court has not held, however, that a citizen has a constitutional right to public employment.

berry v. *Sanders*, 376 U. S. 1, 17 (1964); *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963).[12]

Reynolds v. *Sims* and its progeny[13] focused solely on the discriminatory *effects* of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds*, each citizen must have an "equally effective voice" in the election of representatives. *Reynolds* v. *Sims*, *supra*, at 565. In the present cases, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgment of a fundamental right.[14] It follows, then, that a showing of dis-

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[12] We have not, however, held that the Fourteenth Amendment contains an absolute right to vote. As we explained in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972):

"In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [Citing cases.] This 'equal right to vote' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. . . . But, as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Id.*, at 336 (quoting *Evans* v. *Cornman*, 398 U. S. 419, 426, 422 (1970)).

[13] *Avery* v. *Midland County*, 390 U. S. 474 (1968), applied the equal-representation standard of *Reynolds* v. *Sims* to local governments. See also, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407 (1977); *Lockport* v. *Citizens for Community Action*, 430 U. S. 259 (1977); *Hadley* v. *Junior College Dist.*, 397 U. S. 50 (1970).

[14] In attempting to limit *Reynolds* v. *Sims* to its facts, see *ante*, at 77–79, the plurality confuses the nature of the constitutional right recognized in that decision with the means by which that right can be violated. *Reynolds* held that under the Equal Protection Clause each citizen must

criminatory intent is just as unnecessary under the vote-dilution approach adopted in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), and applied in *White* v. *Regester*, *supra*, as it is under our reapportionment cases.[15]

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be accorded an essentially equal voice in the election of representatives. The Court determined that unequal population distribution in a multi-district representational scheme was one readily ascertainable means by which this right was abridged. The Court certainly did not suggest, however, that violations of the right to effective political participation mattered only if they were caused by malapportionment. The plurality's assertion to the contrary in this case apparently would require it to read *Reynolds* as recognizing fair apportionment as an end in itself, rather than as simply a means to protect against vote dilution.

[15] Proof of discriminatory purpose has been equally unnecessary in our decisions assessing whether various impediments to electoral participation are inconsistent with the fundamental interest in voting. In the seminal case, *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), we invalidated a $1.50 poll tax imposed as a precondition to voting. Relying on our decision two years earlier in *Reynolds* v. *Sims*, see *Harper*, *supra*, at 667–668, 670, we determined that "the right to vote is too precious, too fundamental to be so burdened or conditioned," 383 U. S., at 670. We analyzed the right to vote under the familiar standard that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Ibid.* In accord with *Harper*, we have applied heightened scrutiny in assessing the imposition of filing fees, *e. g.*, *Lubin* v. *Panish*, 415 U. S. 709 (1974); limitations on who may participate in elections involving specialized governmental entities, *e. g.*, *Kramer* v. *Union School District*, 395 U. S. 621 (1969); durational residency requirements, *e. g.*, *Dunn* v. *Blumstein*, *supra*; enrollment time limitations for voting in party primary elections, *e. g.*, *Kusper* v. *Pontikes*, 414 U. S. 51 (1973); and restrictions on candidate access to the ballot, *e. g.*, *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173 (1979).

To be sure, we have approved some limitations on the right to vote. Compare, *e. g.*, *Salyer Land Co.* v. *Tulare Water District*, 410 U. S. 719 (1973), with *Kramer* v. *Union School District*, *supra*. We have never, however, required a showing of discriminatory purpose to support a claim of infringement of this fundamental interest. To the contrary, the Court

Indeed, our vote-dilution cases have explicitly acknowledged that they are premised on the infringement of a fundamental right, not on the Equal Protection Clause's prohibition of racial discrimination. Our first vote-dilution decision, *Fortson* v. *Dorsey*, *supra*, involved a 1962 Georgia reapportionment statute that allocated the 54 seats of the Georgia Senate among the State's 159 counties. Thirty-three of the senatorial districts were made up of from one to eight counties each, and were single-member districts. The remaining 21 districts were allotted among the 7 most populous counties, with each county containing at least 2 districts and electing all of its senators by countywide vote. The plaintiffs, who were registered voters residing in two of the multidistrict counties,[16] argued that the apportionment plan on its face violated the Equal Protection Clause because countywide voting in the seven multidistrict counties denied their residents a vote equal to that of voters residing in single-member con-

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has accepted at face value the purposes articulated for a qualification of this right, and has invalidated such a limitation under the Equal Protection Clause only if its purpose either lacked sufficient substantiality when compared to the individual interests affected or could have been achieved by less restrictive means. See, *e. g.*, *Dunn* v. *Blumstein*, *supra*, at 335, 337, 343–360.

The approach adopted in this line of cases has been synthesized with the one-person, one-vote doctrine of *Reynolds* v. *Sims* in the following fashion: "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 59, n. 2 (1973) (STEWART, J., concurring) (citing *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Kramer* v. *Union School District*, *supra*; *Dunn* v. *Blumstein*, *supra*). It is plain that this standard requires no showing of discriminatory purpose to trigger strict scrutiny of state interference with the right to vote.

[16] See *Dorsey* v. *Fortson*, 228 F. Supp. 259, 261 (ND Ga. 1964) (three-judge court), rev'd, 379 U. S. 433 (1965).

stituencies.[17] We were unconvinced that the plan operated to dilute any Georgian's vote, and therefore upheld the facial validity of the scheme. We cautioned, however, that the Equal Protection Clause would not tolerate a multimember districting plan that "designedly or otherwise, . . . operate[d] to minimize or cancel out the voting strength of racial or *political* elements of the voting population." 379 U. S., at 439 (emphasis added).

The approach to vote dilution adopted in *Fortson* plainly consisted of a fundamental-rights analysis. If the Court had believed that the equal protection problem with alleged vote dilution was one of racial discrimination and not abridgment of the right to vote, it would not have accorded standing to the plaintiffs, who were simply registered voters of Georgia alleging that the state apportionment plan, as a theoretical matter, diluted their voting strength because of where they lived. To the contrary, we did not question their standing, and held against them solely because we found unpersuasive their claim on the merits. The Court did not reach this result by inadvertence; rather, we explicitly recognized that we had adopted a fundamental-rights approach when we stated that the Equal Protection Clause protected the voting strength of political as well as racial groups.

Until today, this Court had never deviated from this principle. We reiterated that our vote-dilution doctrine protects political groups in addition to racial groups in *Burns* v. *Richardson*, 384 U. S., at 88, where we allowed a general class of qualified voters to assert such a vote-dilution claim. In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), we again explicitly recognized that political groups could raise such claims, *id.*, at 143, 144. In *White* v. *Regester*, 412 U. S. 755 (1973),

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[17] Specifically, the plaintiffs contended that countywide voting in the multidistrict counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of one district. *Fortson* v. *Dorsey*, 379 U. S., at 436–437.

the plaintiffs were Negroes and Mexican-Americans, and accordingly the Court had no reason to discuss whether nonminority plaintiffs could assert claims of vote dilution.[18] In a companion case to *White*, however, we again recognized that "political elements" were protected against vote dilution. *Gaffney* v. *Cummings*, 412 U. S. 735, 751 (1973). Two years later, in *Dallas County* v. *Reese*, 421 U. S. 477 (1975) (*per curiam*), we accorded standing to urban dwellers alleging vote dilution as to the election of the county commission and stated that multimember districting is unconstitutional if it "in fact operates impermissibly to dilute the voting strength of an *identifiable element* of the voting population." *Id.*, at 480 (emphasis added). And in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), the plurality opinion of MR. JUSTICE WHITE stated that districting plans were subject to attack if they diluted the vote of *"racial or political groups."* *Id.*, at 167 (emphasis in original).[19]

Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the antidiscrimination branch, of our jurisprudence under the Equal Protection Clause. They recognize a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification. They are premised on a rationale wholly apart from that underlying *Washington* v. *Davis*, 426 U. S. 229 (1976). That decision involved application of a different equal protection principle, the prohibition on racial discrimination in the governmental distribution of interests

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[18] The same is true of our most recent case discussing vote dilution, *Wise* v. *Lipscomb*, 437 U. S. 535 (1978).

[19] In contrast to a racial group, however, a political group will bear a rather substantial burden of showing that it is sufficiently discrete to suffer vote dilution. See *Dallas County* v. *Reese*, 421 U. S. 477 (1975) (*per curiam*) (allowing city dwellers to attack a countywide multimember district). See generally Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1594–1596 (1970).

to which citizens have no constitutional entitlement.[20] Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest.[21]

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[20] The dispute in *Washington* v. *Davis* concerned alleged racial discrimination in public employment, an interest to which no one has a constitutional right, see n. 11, *supra*. In that decision, the Court held only that "the invidious quality of a law *claimed to be racially discriminatory* must ultimately be traced to a racially discriminatory purpose." 426 U. S., at 240 (emphasis added). The Court's decisions following *Washington* v. *Davis* have also involved alleged discrimination in the allocation of interests falling short of constitutional rights. *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979) (alleged sex discrimination in public employment); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977) (alleged racial discrimination in zoning). As explained in *Feeney*, *supra*, "[w]hen some other independent right is not at stake . . . and when there is no 'reason to infer antipathy,' . . . it is presumed that 'even improvident decisions will eventually be rectified by the democratic process.'" 442 U. S., at 272 (quoting *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979)).

[21] Professor Ely has recognized this distinction:

"The danger I see is . . . that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). . . . However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant*. It may become important in court what justifications counsel for the state can *articulate* in support of its denial or nonprovision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Anal-

Washington v. *Davis*, then, in no way alters the discriminatory-impact test developed in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), and applied in *White* v. *Regester*, *supra*, to evaluate claims of dilution of the fundamental right to vote. In my view, that test is now, and always has been, the proper method of safeguarding against inequitable distribution of political influence.

The plurality's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. See *ante*, at 75–80. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. See n. 7, *supra*. The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to elect representatives in proportion to its share of the population. To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process. See *ibid*. Typical of the plurality's mischaracterization of my position is its assertion that I would provide protection against vote dilution for "every 'political group,' or at least every such group that is in the minority." *Ante*, at 75. The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them. See nn. 7 and 19, *supra*. In short, the distinction between a requirement of proportional representation and the discriminatory-effect test I espouse is by no means a difficult one, and it is hard for me to understand why the plurality insists on ignoring it.

The plaintiffs in No. 77–1844 proved that no Negro had ever been elected to the Mobile City Commission, despite the fact that Negroes constitute about one-third of the electorate, and that the persistence of severe racial bloc voting made it highly

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ysis, 15 San Diego L. Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

unlikely that any Negro could be elected at large in the foreseeable future. 423 F. Supp. 384, 387–389 (SD Ala. 1976). Contrary to the plurality's contention, see *ante*, at 75–76, however, I do not find unconstitutional vote dilution in this case simply because of that showing. The plaintiffs convinced the District Court that Mobile Negroes were unable to use alternative avenues of political influence. They showed that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination, and that the City Commission had been quite unresponsive to the needs of the minority community. The City of Mobile has been guilty of such pervasive racial discrimination in hiring employees that extensive intervention by the Federal District Court has been required. 423 F. Supp., at 389, 400. Negroes are grossly underrepresented on city boards and committees. *Id.*, at 389–390. The city's distribution of public services is racially discriminatory. *Id.*, at 390–391. City officials and police were largely unmoved by Negro complaints about police brutality and a "mock lynching." *Id.*, at 392. The District Court concluded that "[t]his sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the [commissioners'] political fear of a white backlash vote when black citizens' needs are at stake." *Ibid.* See also the dissenting opinion of my Brother WHITE, *ante*, p. 94.

A requirement of proportional representation would indeed transform this Court into a "super-legislature," *ante*, at 76, and would create the risk that some groups would receive an undeserved windfall of political influence. In contrast, the protection against vote dilution recognized by our prior cases serves as a minimally intrusive guarantee of political survival for a discrete political minority that is effectively locked out of governmental decisionmaking processes.[22] So under-

[22] It is at this point that my view most diverges from the position expressed by my Brother STEVENS, *ante*, p. 83. He would strictly scrutinize

stood, the doctrine hardly "'create[s] substantive constitutional rights in the name of guaranteeing equal protection of the laws,'" *ibid.*, quoting *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 33. Rather, the doctrine is a simple reflection of the basic principle that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds* v. *Sims*, 377 U. S., at 576.[23]

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state action having an adverse impact on an individual's right to vote. In contrast, he would apply a less stringent standard to state action diluting the political influence of a group. See *ante*, at 83–85. The facts of the present cases, however, demonstrate that severe and persistent racial bloc voting, when coupled with the inability of the minority effectively to participate in the political arena by alternative means, can effectively disable the individual Negro as well as the minority community as a whole. In these circumstances, MR. JUSTICE STEVENS' distinction between the rights of individuals and the political strength of groups becomes illusory.

[23] The foregoing disposes of any contention that, merely by citing *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), the Court in *Washington* v. *Davis*, 426 U. S., at 240, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264, intended to bring vote-dilution cases within the discriminatory-purpose requirement. *Wright* v. *Rockefeller*, *supra*, was a racial gerrymander case, and the plaintiffs had alleged only that they were the victims of an intentional scheme to draw districting lines discriminatorily. In focusing solely on whether the plaintiffs had proved intentional discrimination, the Court in *Wright* v. *Rockefeller* was merely limiting the scope of its inquiry to the issue raised by the plaintiffs. If *Wright* v. *Rockefeller* had been brought after this Court had decided our vote-dilution decisions, the plaintiffs perhaps would have recognized that, in addition to a claim of intentional racial gerrymandering, they could allege an equally sufficient cause of action under the Equal Protection Clause—that the districting lines had the effect of diluting their vote.

Wright v. *Rockefeller*, then, treated proof of discriminatory purpose as a sufficient condition to trigger strict scrutiny of a districting scheme, but had no occasion to consider whether such proof was necessary to invoke that standard. Its citations in *Washington* v. *Davis*, *supra*, and *Arlington*

II

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Today the plurality gives short shrift to the argument that proof of discriminatory intent is not a necessary condition to relief under this Amendment. See *ante*, at 61–65.[24] I have examined this issue in another context and reached the contrary result. *Beer* v. *United States*, 425 U. S. 130, 146–149, and nn. 3–5 (1976) (dissenting opinion). I continue to be-

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Heights, *supra*, were useful to show the relevancy, but not the necessity, of evidence of discriminatory intent. These citations are in no way inconsistent with my view that proof of discriminatory purpose is not a necessary condition to the invalidation of multimember districts that dilute the vote of racial or political elements.

In addition, any argument that, merely by citing *Wright* v. *Rockefeller*, the Court in *Washington* v. *Davis* and *Arlington Heights* intended to apply the discriminatory-intent requirement to vote-dilution claims is premised on two unpalatable assumptions. First, because the discussion of *Wright* v. *Rockefeller* was unnecessary to the resolution of the issues in both of those decisions, the argument assumes that the Court in both cases decided important issues in brief dicta. Second, the argument assumes that the Court twice intended covertly to overrule the discriminatory-effects test applied in *White* v. *Regester*, 412 U. S. 755 (1973), without even citing *White*. Neither assumption is tenable.

[24] It is important to recognize that only the four Members of the plurality are committed to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that proof of discriminatory effect can be a sufficient condition to support the invalidation of districting, see *ante*, at 90. My Brother WHITE finds the proof of discriminatory purpose in these cases sufficient to support the decisions of the Courts of Appeals, and accordingly he does not reach the issue whether proof of discriminatory impact, standing alone, would suffice under the Fifteenth Amendment. My Brother BLACKMUN also expresses no view on this issue, since he too finds the proof of discriminatory intent sufficient to support the findings of violations of the Constitution.

lieve that "a showing of purpose or of effect is alone sufficient to demonstrate unconstitutionality," *id.*, at 149, n. 5, and wish to explicate further why I find this standard appropriate for Fifteenth Amendment claims. First, however, it is necessary to address the plurality's apparent suggestion that the Fifteenth Amendment protects against only denial, and not dilution, of the vote.[25]

A

The Fifteenth Amendment does not confer an absolute right to vote. See *ante*, at 62. By providing that the right to vote cannot be discriminatorily "denied *or* abridged," however, the Amendment assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise. An interpretation holding that the Amendment reaches only complete abrogation of the vote would render the Amendment essentially useless, since it is no difficult task to imagine schemes in which the Negro's marking of the ballot is a meaningless exercise.

The Court has long understood that the right to vote encompasses protection against vote dilution. "[T]he right to have one's vote counted" is of the same importance as "the right to put a ballot in a box." *United States* v. *Mosley*, 238 U. S. 383, 386 (1915). See *United States* v. *Classic*, 313 U. S. 299 (1941); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Ex parte Yarbrough*, 110 U. S. 651 (1884). The right to vote is protected against the diluting effect of ballot-box stuffing. *United States* v. *Saylor*, 322 U. S. 385 (1944); *Ex parte Siebold*, 100 U. S. 371 (1880). Indeed, this Court has explicitly recognized that the Fifteenth Amendment protects against vote dilution. In *Terry* v. *Adams*, 345 U. S. 461 (1953), and *Smith* v. *Allwright*, 321 U. S.

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[25] The plurality states that "[h]aving found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Ante*, at 65.

649 (1944), the Negro plaintiffs did not question their access to the ballot for general elections. Instead they argued, and the Court recognized, that the value of their votes had been diluted by their exclusion from participation in primary elections and in the slating of candidates by political parties. The Court's struggles with the concept of "state action" in those decisions were necessarily premised on the understanding that vote dilution was a claim cognizable under the Fifteenth Amendment.

Wright v. *Rockefeller*, 376 U. S. 52 (1964), recognized that an allegation of vote dilution resulting from the drawing of district lines stated a claim under the Fifteenth Amendment. The plaintiffs in that case argued that congressional districting in New York violated the Fifteenth Amendment because district lines had been drawn in a racially discriminatory fashion. Each plaintiff had access to the ballot; their complaint was that because of intentional discrimination they resided in a district with population characteristics that had the effect of diluting the weight of their votes. The Court treated this claim as cognizable under the Fifteenth Amendment. More recently, in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), we again treated an allegation of vote dilution arising from a redistricting scheme as stating a claim under the Fifteenth Amendment. See *id.*, at 155, 161–162, 165–168 (opinion of WHITE, J.). Indeed, in that case MR. JUSTICE STEWART found no Fifteenth Amendment violation in part because the plaintiffs had failed to prove "that the redistricting scheme was employed . . . to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process." *Id.*, at 179 (STEWART, J., joined by POWELL, J., concurring in judgment) (citing, *e. g.*, *White* v. *Regester*, 412 U. S. 755 (1973); *Fortson* v. *Dorsey*, 379 U. S. 433 (1965); *Wright* v. *Rockefeller*, *supra*). See also *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960).

It is plain, then, that the Fifteenth Amendment shares the concept of vote dilution developed in such Fourteenth Amendment decisions as *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and *Fortson* v. *Dorsey*, *supra*. In fact, under the Court's unified view of the protections of the right to vote accorded by disparate portions of the Constitution, the concept of vote dilution is a core principle of the Seventeenth and Nineteenth Amendments as well as the Fourteenth and Fifteenth:

> "The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry* v. *Adams*, 345 U. S. 461. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.
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> . . . . . .
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> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U. S., at 379, 381.

The plurality's suggestion that the Fifteenth Amendment reaches only outright denial of the ballot is wholly inconsistent not only with our prior decisions, but also with the gloss the plurality would place upon the Fourteenth Amendment's protection against vote dilution. As I explained in Part I, *supra*, I strongly disagree with the plurality's conclusion that our

Fourteenth Amendment vote-dilution decisions have been based upon the Equal Protection Clause's prohibition of racial discrimination. Be that as it may, the plurality at least does not dispute that the Fourteenth Amendment's language—that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—protects against dilution, as well as outright denial, of the right to vote on racial grounds, even though the Amendment does not mention any right to vote and speaks only of the denial, and not the diminution, of rights. Yet, when the plurality construes the language of the Fifteenth Amendment—which explicitly acknowledges the right to vote and prohibits its denial *or* abridgment on account of race—it seemingly would accord protection against only the absolute abrogation of the ballot.

An interpretation of the Fifteenth Amendment limiting its prohibitions to the outright denial of the ballot would convert the words of the Amendment into language illusory in symbol and hollow in substance. Surely today's decision should not be read as endorsing that interpretation.[26]

B

The plurality concludes that our prior decisions establish the principle that proof of discriminatory intent is a necessary element of a Fifteenth Amendment claim.[27] In contrast, I

[26] Indeed, five Members of the Court decline the opportunity to ascribe to this view. In addition to my Brother BRENNAN and myself, my Brother STEVENS expressly states that the Fifteenth Amendment protects against diminution as well as denial of the ballot, see *ante*, at 84, and n. 3. The dissenting opinion of my Brother WHITE and the separate opinion of my Brother BLACKMUN indicate that they share this view.

[27] The plurality does not attempt to support this proposition by relying on the history surrounding the adoption of the Fifteenth Amendment. I agree that we should resolve the issue of the relevancy of proof of discriminatory purpose and effect by examining our prior decisions and by considering the appropriateness of alternative standards in light of contemporary circumstances. That was, of course, the approach used in *Washington* v. *Davis*, 426 U. S. 229 (1976), to evaluate that issue with regard to Fourteenth Amendment racial discrimination claims.

continue to adhere to my conclusion in *Beer* v. *United States*, 425 U. S., at 148, n. 4 (dissenting opinion), that "[t]he Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web." As I there explained, at various times the Court's decisions have seemed to adopt three inconsistent approaches: (1) that purpose alone is the test for unconstitutionality; (2) that effect alone is the test; and (3) that purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. *Ibid.* In my view, our Fifteenth Amendment jurisprudence on the necessity of proof of discriminatory purpose is no less unsettled than was our approach to the importance of such proof in Fourteenth Amendment racial discrimination cases prior to *Washington* v. *Davis*, 426 U. S. 229 (1976). What is called for in the present cases is a fresh consideration—similar to our inquiry in *Washington* v. *Davis*, *supra*, with regard to Fourteenth Amendment discrimination claims—of whether proof of discriminatory purpose is necessary to establish a claim under the Fifteenth Amendment. I will first justify my conclusion that our Fifteenth Amendment precedents do not control the outcome of this issue, and then turn to an examination of how the question should be resolved.

1

The plurality cites *Guinn* v. *United States*, 238 U. S. 347 (1915); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Wright* v. *Rockefeller*, 376 U. S. 52 (1964); *Lassiter* v. *Northampton Election Bd.*, 360 U. S. 45 (1959); and *Lane* v. *Wilson*, 307 U. S. 268 (1939), as holding that proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim. To me, these decisions indicate confusion, not resolution of this issue. As the plurality suggests, *ante*, at 62, the Court in *Guinn* v. *United States*, *supra*, did examine the purpose of a "grandfather clause" in the course of invalidating it. Yet 24 years later, in *Lane* v. *Wilson*, *supra*, at 277, the Court

struck down a more sophisticated exclusionary scheme because it "operated unfairly" against Negroes. In accord with the prevailing doctrine of the time, see *Arizona* v. *California*, 283 U. S. 423, 455, and n. 7 (1931), the Court in *Lane* seemingly did not question the motives of public officials.

In upholding the use of a literacy test for voters in *Lassiter* v. *Northampton Election Bd.*, *supra*, the Court apparently concluded that the plaintiff had failed to prove either discriminatory purpose or effect. *Gomillion* v. *Lightfoot*, *supra*, can be read as turning on proof of discriminatory motive, but the Court also stressed that the challenged redrawing of municipal boundaries had the "essential inevitable effect" of removing Negro voters from the city, 364 U. S., at 341, and that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," *id.*, at 347. Finally, in *Wright* v. *Rockefeller*, *supra*, the plaintiffs alleged only purposeful discriminatory redistricting, and therefore the Court had no reason to consider whether proof of discriminatory effect would satisfy the Fifteenth Amendment.[28]

The plurality ignores cases suggesting that discriminatory purpose is not necessary to support a Fifteenth Amendment claim. In *Terry* v. *Adams*, 345 U. S. 461 (1953), a case in which no majority opinion was issued, three Justices approvingly discussed two decisions of the United States Court of Appeals for the Fourth Circuit[29] holding "that no election machinery could be sustained if its purpose *or* effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.*, at 466 (opinion of Black, J., joined by Douglas and Burton, JJ.) (emphasis added). More recently, in rejecting a First Amendment challenge to a federal statute provid-

[28] See n. 23, *supra*.

[29] *Rice* v. *Elmore*, 165 F. 2d 387 (1947), cert. denied, 333 U. S. 875 (1948), and *Baskin* v. *Brown*, 174 F. 2d 391 (1949).

ing criminal penalties for knowing destruction of a Selective Service registration certificate, the Court in *United States* v. *O'Brien*, 391 U. S. 367, 383 (1968), stated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The Court in *O'Brien*, *supra*, at 385, interpreted *Gomillion* v. *Lightfoot*, *supra*, as turning on the discriminatory effect, and not the alleged discriminatory purpose, of the challenged redrawing of municipal boundaries. Three years later, in *Palmer* v. *Thompson*, 403 U. S. 217, 224–225 (1971), the Court relied on *O'Brien* to support its refusal to inquire whether a city had closed its swimming pools to avoid racial integration. As in *O'Brien*, the Court in *Palmer*, *supra*, at 225, interpreted *Gomillion* v. *Lightfoot* as focusing "on the actual effect" of the municipal boundary change, and not upon what motivated the city to redraw its borders. See also *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 461–462 (1972).

In holding that racial discrimination claims under the Equal Protection Clause must be supported by proof of discriminatory intent, the Court in *Washington* v. *Davis*, *supra*, signaled some movement away from the doctrine that such proof is irrelevant to constitutional adjudication. Although the Court, 426 U. S., at 242–244, and n. 11, attempted mightily to distinguish *Palmer* v. *Thompson*, *supra*, its decision was in fact based upon a judgment that, in light of modern circumstances, the Equal Protection Clause's ban on racial discrimination in the distribution of constitutional gratuities should be interpreted as prohibiting only intentional official discrimination.[30]

These vacillations in our approach to the relevance of discriminatory purpose belie the plurality's determination that our prior decisions require such proof to support Fifteenth Amendment claims. To the contrary, the Court today is in

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[30] See nn. 20, 21, *supra*, and accompanying text.

the same unsettled position with regard to the Fifteenth Amendment as it was four years ago in *Washington* v. *Davis*, *supra*, regarding the Fourteenth Amendment's prohibition of racial discrimination. The absence of old answers mandates a new inquiry.

2

The Court in *Washington* v. *Davis* required a showing of discriminatory purpose to support racial discrimination claims largely because it feared that a standard based solely on disproportionate impact would unduly interfere with the far-ranging governmental distribution of constitutional gratuities.[31] Underlying the Court's decision was a determination that, since the Constitution does not entitle any person to such governmental benefits, courts should accord discretion to those officials who decide how the government shall allocate its scarce resources. If the plaintiff proved only that governmental distribution of constitutional gratuities had a disproportionate effect on a racial minority, the Court was willing to presume that the officials who approved the allocation scheme either had made an honest error or had foreseen that the decision would have a discriminatory impact and had found persuasive, legitimate reasons for imposing it nonetheless. These assumptions about the good faith of officials allowed the Court to conclude that, standing alone, a showing that a governmental policy had a racially discriminatory impact did not indicate that the affected minority had suffered the stigma, frustration, and unjust treatment prohibited

[31] The Court stated:

"A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." 426 U. S., at 248.

See n. 20, *supra*.

under the suspect-classification branch of our equal protection jurisprudence.

Such judicial deference to official decisionmaking has no place under the Fifteenth Amendment. Section 1 of that Amendment differs from the Fourteenth Amendment's prohibition on racial discrimination in two crucial respects: it explicitly recognizes the right to vote free of hindrances related to race, and it sweeps no further. In my view, these distinctions justify the conclusion that proof of racially discriminatory impact should be sufficient to support a claim under the Fifteenth Amendment. The right to vote is of such fundamental importance in the constitutional scheme that the Fifteenth Amendment's command that it shall not be "abridged" on account of race must be interpreted as providing that the votes of citizens of all races shall be of substantially equal weight. Furthermore, a disproportionate-impact test under the Fifteenth Amendment would not lead to constant judicial intrusion into the process of official decisionmaking. Rather, the standard would reach only those decisions having a discriminatory effect upon the minority's vote. The Fifteenth Amendment cannot tolerate that kind of decision, even if made in good faith, because the Amendment grants racial minorities the full enjoyment of the right to vote, not simply protection against the unfairness of intentional vote dilution along racial lines.[32]

In addition, it is beyond dispute that a standard based solely upon the motives of official decisionmakers creates significant problems of proof for plaintiffs and forces the inquiring court to undertake an unguided, tortuous look into the minds of officials in the hope of guessing why certain policies were adopted and others rejected. See *Palmer* v. *Thomp-*

[32] Even if a municipal policy is shown to dilute the right to vote, however, the policy will not be struck down if the city shows that it serves highly important local interests and is closely tailored to effectuate only those interests. See *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). Cf. *Abate* v. *Mundt*, 403 U. S. 182 (1971).

son, 403 U. S., at 224–225; *United States* v. *O'Brien*, 391 U. S., at 382–386; cf. *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U. S. 189, 224, 227 (1973) (POWELL, J., concurring in part and dissenting in part). An approach based on motivation creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their motives through the use of subtlety and illusion. *Washington* v. *Davis* is premised on the notion that this risk is insufficient to overcome the deference the judiciary must accord to governmental decisions about the distribution of constitutional gratuities. That risk becomes intolerable, however, when the precious right to vote protected by the Fifteenth Amendment is concerned.

I continue to believe, then, that under the Fifteenth Amendment an "[e]valuation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. . . . [A] demonstration of effect ordinarily should suffice. If, of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality." *Beer* v. *United States*, 425 U. S., at 149–150, n. 5 (MARSHALL, J., dissenting). The plurality's refusal in this case even to consider this approach bespeaks an indifference to the plight of minorities who, through no fault of their own, have suffered diminution of the right preservative of all other rights.[33]

[33] In my view, the standard of *White* v. *Regester*, 412 U. S. 755 (1973), see n. 7, *supra*, and accompanying text, is the proper test under both the Fourteenth and Fifteenth Amendments for determining whether a districting scheme has the unconstitutional effect of diluting the Negro vote. It is plain that the District Court in both of the cases before us made the "intensely local appraisal" necessary under *White*, *supra*, at 769, and correctly decided that the at-large electoral schemes for the Mobile City Commission and County School Board violated the *White* standard. As I earlier note with respect to No. 77–1844, see *supra*, at 122–123, the District Court determined: (1) that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination; (2) that the City Commission and County School Board had been quite

III

If it is assumed that proof of discriminatory intent is necessary to support the vote-dilution claims in these cases, the question becomes what evidence will satisfy this requirement.[34]

The plurality assumes, without any analysis, that these cases are appropriate for the application of the rigid test developed in *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S., at 279, requiring that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." In my view, the *Feeney* standard creates a burden of proof far too extreme to apply in vote-dilution cases.[35]

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unresponsive to the needs of the minority community; (3) that no Negro had ever been elected to either body, despite the fact that Negroes constitute about one-third of the electorate; (4) that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at large to either body in the foreseeable future; and (5) that no state policy favored at-large elections, and the local preference for that scheme was outweighed by the fact that the unconstitutional vote dilution could be corrected only by the imposition of single-member districts. *Bolden* v. *City of Mobile*, 423 F. Supp. 384 (SD Ala. 1976); *Brown* v. *Moore*, 428 F. Supp. 1123 (SD Ala. 1976). The Court of Appeals affirmed these findings in all respects. *Bolden* v. *City of Mobile*, 571 F. 2d 238 (CA5 1978); *Brown* v. *Moore*, 575 F. 2d 298 (CA5 1978). See also the dissenting opinion of my Brother WHITE, *ante*, p. 94.

[34] The statutes providing for at-large election of the members of the two governmental bodies involved in these cases, see n. 33, *supra*, have been in effect since the days when Mobile Negroes were totally disenfranchised by the Alabama Constitution of 1901. The District Court in both cases found, therefore, that the at-large schemes could not have been adopted for discriminatory purposes. *Bolden* v. *City of Mobile*, 423 F. Supp., at 386, 397; *Brown* v. *Moore*, 428 F. Supp., at 1126–1127, 1138. The issue is, then, whether officials have maintained these electoral systems for discriminatory purposes. Cf. *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 257–258, 267–271, and n. 17.

[35] As the dissenting opinion of my Brother WHITE demonstrates, however, the facts of these cases compel a finding of unconstitutional vote dilution even under the plurality's standard.

This Court has acknowledged that the evidentiary inquiry involving discriminatory intent must necessarily vary depending upon the factual context. See *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S., at 264–268; *Washington* v. *Davis*, 426 U. S., at 253 (STEVENS, J., concurring). One useful evidentiary tool, long recognized by the common law, is the presumption that "[e]very man must be taken to contemplate the probable consequences of the act he does." *Townsend* v. *Wathen*, 9 East. 277, 280, 103 Eng. Rep. 579, 580–581 (K. B. 1808). The Court in *Feeney*, *supra*, at 279, n. 25, acknowledged that proof of foreseeability of discriminatory consequences could raise a "strong inference that the adverse effects were desired," but refused to treat this presumption as conclusive in cases alleging discriminatory distribution of constitutional gratuities.

I would apply the common-law foreseeability presumption to the present cases. The plaintiffs surely proved that maintenance of the challenged multimember districting would have the foreseeable effect of perpetuating the submerged electoral influence of Negroes, and that this discriminatory effect could be corrected by implementation of a single-member districting plan.[36] Because the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants, and they should have been required to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect. See *Feeney*, *supra*, at 284 (MARSHALL, J., dissenting). Reallocation of the burden of proof is especially appropriate in these cases, where the challenged state action infringes the exercise of a fundamental right. The defendants would carry their burden of proof only if they showed that they considered submergence

[36] Indeed, the District Court in the present cases concluded that the evidence supported the plaintiffs' position that unconstitutional vote dilution was the natural and foreseeable consequence of the maintenance of the challenged multimember districting. *Brown* v. *Moore*, 428 F. Supp., at 1138; *Bolden* v. *City of Mobile*, 423 F. Supp., at 397–398.

of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons. Cf. *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*, at 270–271, n. 21.

This approach recognizes that

> "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington* v. *Davis*, *supra*, at 253 (STEVENS, J., concurring).

Furthermore, if proof of discriminatory purpose is to be required in these cases, this standard would comport with my view that the degree to which the government must justify a decision depends upon the importance of the interests infringed by it. See *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S., at 109–110 (MARSHALL, J., dissenting).[37]

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[37] MR. JUSTICE STEVENS acknowledges that both discriminatory intent and discriminatory effect are present in No. 77-1844. See *ante*, at 92–94. Nonetheless, he finds no constitutional violation, apparently because he believes that the electoral structure of Mobile conforms to a commonly used scheme, the discriminatory impact is in his view not extraordinary, and the structure is supported by sufficient noninvidious justifications so that it is neither wholly irrational nor entirely motivated by discriminatory animus. To him, racially motivated decisions in this setting are an inherent part of the political process and do not involve invidious discrimination.

The facts of the present cases, however, indicate that in Mobile considerations of race are far more powerful and pernicious than are considerations of other divisive aspects of the electorate. See *supra*, at 122–123. In Mobile, as elsewhere, "the experience of Negroes . . . has been different

The plurality also fails to recognize that the maintenance of multimember districts in the face of foreseeable discriminatory consequences strongly suggests that officials are blinded by "racially selective sympathy and indifference." [38] Like outright racial hostility, selective racial indifference reflects a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites. When an interest as fundamental as voting is diminished along racial lines, a requirement that discriminatory purpose must be proved should be satisfied by a showing that official action was produced by this type of pervasive bias. In the present cases, the plaintiffs presented strong evidence of such bias: they showed that Mobile officials historically discriminated against Negroes, that there are pervasive present effects of this past discrimination, and that officials have not been responsive to the needs of the minority community. It takes only the smallest of inferential leaps to conclude that the decisions to maintain multimember districting having obvious discriminatory effects represent, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of inhumanity.[39]

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in kind, not just in degree, from that of other ethnic groups." *University of California Regents* v. *Bakke*, 438 U. S. 265, 400 (1978) (opinion of MARSHALL, J.). An approach that accepts intentional discrimination against Negroes as merely an aspect of "politics as usual" strikes at the very hearts of the Fourteenth and Fifteenth Amendments.

[38] Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7 (1976). See also Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis*, 76 Mich. L. Rev. 694, 716–719 (1978).

[39] The plurality, *ante*, at 74–75, n. 21, indicates that on remand the lower courts are to examine the evidence in these cases under the discriminatory-intent standard of *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979), and may conclude that this test is met by proof of the refusal of Mobile's state-legislative delegation to stimulate the passage

IV

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote,

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of legislation changing Mobile's city government into a mayor-council system in which council members are elected from single-member districts. The plurality concludes, then, only that the District Court and the Court of Appeals in each of the present cases evaluated the evidence under an improper legal standard, and not that the evidence fails to support a claim under *Feeney, supra*. When the lower courts examine these cases under the *Feeney* standard, they should, of course, recognize the relevancy of the plaintiffs' evidence that vote dilution was a foreseeable and natural consequence of the maintenance of the challenged multimember districting, and that officials have apparently exhibited selective racial sympathy and indifference. Cf. *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526 (1979); *Columbus Board of Education* v. *Penick*, 443 U. S. 449 (1979).

Finally, it is important not to confuse the differing views the plurality and I have on the elements of proving unconstitutional vote dilution. The plurality concludes that proof of intentional discrimination, as defined in *Feeney, supra*, is necessary to support such a claim. The plurality finds this requirement consistent with the statement in *White* v. *Regester*, 412 U. S., at 766, that unconstitutional vote dilution does not occur simply because a minority has not been able to elect representatives in proportion to its voting potential. The extra necessary element, according to the plurality, is a showing of discriminatory intent. In the plurality's view, the evidence presented in *White* going beyond mere proof of underrepresentation of the minority properly supported an inference that the multimember districting scheme in question was tainted with a discriminatory purpose.

The plurality's approach should be satisfied, then, by proof that an electoral scheme enacted with a discriminatory purpose effected a retrogression in the minority's voting power. Cf. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). The standard should also be satisfied by proof that a scheme maintained for a discriminatory purpose has the effect of submerging minority electoral influence below the level it would have under a reasonable alternative scheme.

The plurality does not address the question whether proof of discriminatory effect is necessary to support a vote-dilution claim. It is clear from the above, however, that if the Court at some point creates such a requirement, it would be satisfied by proof of mere disproportionate impact. Such a requirement would be far less stringent than the burden of proof re-

public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights. The theoretical foundations for these approaches are shattered where, as in the present cases, the right to vote is granted in form, but denied in substance.

It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U. S., at 275, it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.

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quired under the rather rigid discriminatory-effects test I find in *White* v. *Regester*, *supra*. See n. 7, *supra*, and accompanying text.

WENGLER *v.* DRUGGISTS MUTUAL INSURANCE CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI

No. 79-381. Argued February 25, 1980—Decided April 22, 1980

Held: The provision of the Missouri workers' compensation laws denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on his wife's earnings, but granting a widow death benefits without her having to prove dependence on her husband's earnings, violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 147–152.

(a) The statute indisputably mandates gender-based discrimination and discriminates against both men and women. It discriminates against a woman since, in the case of her death, benefits are payable to her spouse only if he meets the incapacity or dependency tests, whereas death benefits are automatically paid to a widow because dependency on her husband is conclusively presumed, a female wage earner thus being provided with less protection for her spouse on her work-related death than is provided for the widow of a deceased male wage earner. And the statute discriminates against a man who survives his wife's dying in a work-related accident because to receive benefits he, in contrast to a widow, must prove incapacity or dependency. Pp. 147–149.

(b) To be justified, gender-based discriminations must serve important governmental objectives and the discriminatory means employed must be substantially related to the achievement of those objectives. Here, the claimed justification for not treating men and women alike—that women are generally dependent on male wage earners and that it is more efficient to presume dependency in the case of women than to engage in case-by-case determination, whereas individualized inquiries in the few cases in which men might be dependent are not prohibitively costly—is unsubstantiated and thus cannot save the gender-based discrimination in question. Pp. 150–152.

583 S. W. 2d 162, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 154. REHNQUIST, J., filed a dissenting statement, *post*, p. 153.

John W. Reid II argued the cause and filed a brief for appellant.

Ralph C. Kleinschmidt argued the cause for appellees. With him on the brief was *Gerre S. Langton.**

MR. JUSTICE WHITE delivered the opinion of the Court.

This case challenges under the Equal Protection Clause of the Fourteenth Amendment a provision of the Missouri workers' compensation laws, Mo. Rev. Stat. § 287.240 (Supp. 1979), which is claimed to involve an invalid gender-based discrimination.

I

The facts are not in dispute. On February 11, 1977, Ruth Wengler, wife of appellant Paul J. Wengler, died in a work-related accident in the parking lot of her employer, appellee Dicus Prescription Drugs, Inc. Appellant filed a claim for death benefits under Mo. Rev. Stat. § 287.240 (Supp. 1979),[1]

**Ruth Bader Ginsburg* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Solicitor General McCree, Assistant Attorney General Days, Stuart A. Smith, Brian K. Landsberg, and *Mark L. Gross* filed a brief for the United States as *amicus curiae.*

[1] Missouri Rev. Stat. § 287.240 (Supp. 1979) provides in its entirety (emphasis added):

"If the injury causes death, either with or without disability, the compensation therefor shall be as provided in this section:

"(1) In all cases the employer shall pay direct to the persons furnishing the same the reasonable expense of the burial of the deceased employee not exceeding two thousand dollars. But no person shall be entitled to compensation for the burial expenses of a deceased employee unless he has furnished the same by authority of the widow or widower, the nearest relative of the deceased employee in the county of his death, his personal representative, or the employer, who shall have the right to give the authority in the order named. All fees and charges under this section shall be fair and reasonable, shall be subject to regulation by the division or the commission and shall be limited to such as are fair and reasonable for similar service to persons of a like standard of living. The division or

under which a widower is not entitled to death benefits unless he either is mentally or physically incapacitated from wage

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the commission shall also have jurisdiction to hear and determine all disputes as to the charges. If the deceased employee leaves no dependents the death benefit in this subdivision provided shall be the limit of the liability of the employer under this chapter on account of the death, except as herein provided for burial expenses and except as provided in section 287.140; provided, that in all cases when the employer admits or does not deny liability for the burial expense, it shall be paid within thirty days after written notice, that the service has been rendered, has been delivered to the employer. The notice may be sent by registered mail, return receipt requested, or may be made by personal delivery;

"(2) *The employer shall* also *pay to* the total *dependents of the employee a death benefit* on the basis of sixty-six and two-thirds percent of the employee's average weekly earnings during the year immediately preceding the injury as provided in section 287.250. Compensation shall be payable in installments in the same manner that compensation is required to be paid under this chapter, but in no case be less than at the rate of sixteen dollars per week nor more than one hundred twenty dollars per week or as provided in section 287.160. If there is a total dependent, no death benefit shall be payable to partial dependents or any other persons except as provided in subdivision (1);

"(3) If there are partial dependents, and no total dependents, a part of the death benefit herein provided in the case of total dependents, determined by the proportion of his contributions to all partial dependents by the employee at the time of the injury, shall be paid by the employer to each of the dependents proportionately;

"(4) *The word 'dependent' as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents:*

"(a) *A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife;* provided, that on the death or remarriage of a widow or widower, the death benefit shall cease unless there be other total dependents entitled to any death benefit under this chapter. In the event of remarriage, a lump sum payment equal in amount to the benefits due for a period of two

earning or proves actual dependence on his wife's earnings. In contrast, a widow qualifies for death benefits without hav-

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years shall be paid to the widow or widower. Thereupon the periodic death benefits shall cease unless there are other total dependents entitled to any death benefit under this chapter in which event the periodic benefits to which said widow or widower would have been entitled had he or she not died or remarried, shall be divided among such other total dependents and paid to them during their period of entitlement under this chapter;

"(b) A natural, posthumous, or adopted child or children, whether legitimate or illegitimate, under the age of eighteen years, or over that age if physically or mentally incapacitated from wage earning, upon the parent legally liable for the support or with whom he is living at the time of the death of the parent. In case there is a wife or a husband mentally or physically incapacitated from wage earning, dependent upon a wife, and a child or more than one child thus dependent, the death benefit shall be divided among them in such proportion as may be determined by the commission after considering their ages and other facts bearing on the dependency. In all other cases questions of total or partial dependency shall be determined in accordance with the facts at the time of the injury, and in such other cases if there is more than one person wholly dependent the death benefit shall be divided equally among them. The payment of death benefits to a child or other dependent as provided in this paragraph shall cease when the dependent dies, attains the age of eighteen years, or becomes physically and mentally capable of wage earning over that age, or until twenty-two years of age if the child of the deceased is in attendance and remains as a full-time student in any accredited educational institution, or if at eighteen years of age the dependent child is a member of the armed forces of the United States on active duty; provided, however, that such dependent child shall be entitled to compensation during four years of full-time attendance at a fully accredited educational institution to commence prior to twenty-three years of age and immediately upon cessation of his active duty in the armed forces, unless there are other total dependents entitled to the death benefit under this chapter;

"(5) The division or the commission may, in its discretion, order or award the share of compensation of any such child to be paid to the parent, grandparent, or other adult next of kin or legal guardian of the child for the latter's support, maintenance and education, which order or award upon notice to the parties may be modified from time to time by the commission in its discretion with respect to the person to whom shall

ing to prove actual dependence on her husband's earnings.[2]

Appellant stipulated that he was neither incapacitated nor dependent on his wife's earnings, but argued that, owing to its disparate treatment of similarly situated widows and widowers, § 287.240 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The claim was administratively denied, but the Circuit Court of Madison County reversed, holding that § 287.240 violated the Equal Protection Clause because the statutory restriction on a widower's recovery of death benefits did not also apply to a surviving wife. Dicus and its insurer, appellee Druggists Mutual Insurance Co., were ordered to pay death benefits to appellant in the appropriate amount. App. to Juris. Statement A22–A25.

The Missouri Supreme Court, distinguishing certain cases in this Court, reversed the Circuit Court's decision. The equal protection challenge to § 287.240 failed because "the substantive difference in the economic standing of working men and women justifies the advantage that [§ 287.240] administratively gives to a widow." 583 S. W. 2d 162, 168 (1979).

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be paid the amount of the order or award remaining unpaid at the time of the modification;

"(6) The payments of compensation by the employer in accordance with the order or award of the division or the commission shall discharge the employer from all further obligations as to the compensation;

"(7) All death benefits in this chapter shall be paid in installments in the same manner as provided for disability compensation;

"(8) Every employer shall keep a record of the correct names and addresses of the dependents of each of his employees, and upon the death of an employee by accident arising out of and in the course of his employment shall so far as possible immediately furnish the division with said names and addresses."

[2] At the time of her death Mrs. Wengler's wages were $69 per week. Had appellant prevailed in his attempt to receive full death benefits under the statute, his compensation would have been $46 per week. App. to Juris. Statement A23; see Mo. Rev. Stat. § 287.240 (2) (Supp. 1979). These benefits would have continued until appellant's death or remarriage. § 287.240 (4) (a).

Because the decision of the Supreme Court of Missouri arguably conflicted with our precedents, we noted probable jurisdiction. 444 U. S. 924 (1979). We now reverse.[3]

II

The Missouri law indisputably mandates gender-based discrimination. Although the Missouri Supreme Court was of the view that the law favored, rather than disfavored, women, it is apparent that the statute discriminates against both men and women. The provision discriminates against a woman covered by the Missouri workers' compensation system since, in the case of her death, benefits are payable to her spouse only if he is mentally or physically incapacitated or was to some extent dependent upon her. Under these tests, Mrs. Wengler's spouse was entitled to no benefits. If Mr. Wengler had died, however, Mrs. Wengler would have been conclusively presumed to be dependent and would have been paid the statutory amount for life or until she remarried even though she may not in fact have been dependent on Mr. Wengler. The benefits, therefore, that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner.

It is this kind of discrimination against working women that our cases have identified and in the circumstances found unjustified. At issue in *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975), was a provision in the Social Security Act, 42 U. S. C. § 402 (g), that granted survivors' benefits based on

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[3] Recent decisions in three States have held unconstitutional workers' compensation statutes with presumptions of dependency identical to that at issue in this case. *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d 395, 563 P. 2d 849 (1977); *Passante* v. *Walden Printing Co.*, 53 App. Div. 2d 8, 385 N. Y. S. 2d 178 (1976); *Tomarchio* v. *Township of Greenwich*, 75 N. J. 62, 379 A. 2d 848 (1977). The workers' compensation laws of the vast majority of States now make no distinction between the eligibility of widows and widowers for death benefits.

the earnings of a deceased husband and father covered by the Act both to his widow and to the couple's minor children in her care, but that granted benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower. In concluding that the provision violated the equal protection component of the Fifth Amendment, we noted that, "[o]bviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support." *Weinberger* v. *Wiesenfeld, supra,* at 645, citing *Kahn* v. *Shevin,* 416 U. S. 351, 354, n. 7 (1974).[4] But such a generalization could not itself justify the gender-based distinction found in the Act, for § 402 (g) "clearly operate[d] . . . to deprive women of protection for their families which men receive as a result of their employment." 420 U. S., at 645. The offensive assumption was "that male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.,* at 643 (footnote omitted).

Similarly, in *Califano* v. *Goldfarb,* 430 U. S. 199 (1977), we dealt with a Social Security Act provision providing survivors' benefits to a widow regardless of dependency, but providing the same benefits to a widower only if he had been receiving at least half of his support from his deceased wife. 42 U. S. C. § 402 (f)(1)(D). MR. JUSTICE BRENNAN's plural-

[4] In *Kahn* v. *Shevin,* the Court upheld a Florida annual $500 real estate tax exemption for all widows in the face of an equal protection challenge. The Court believed that statistics established a lower median income for women than men, a discrepancy that justified "a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." 416 U. S., at 355. As in *Kahn* we accept the importance of the state goal of helping needy spouses, see *infra,* at 151, but as described in text the Missouri law in our view is not "reasonably designed" to achieve this goal. Thus the holding in *Kahn* is in no way dispositive of the case at bar.

ity opinion pointed out that, under the challenged section, "female insureds received less protection for their spouses solely because of their sex" and that, as in *Wiesenfeld*, the provision disadvantaged women as compared to similarly situated men by providing the female wage earner with less protection for her family than it provided the family of the male wage earner even though the family needs might be identical. *Califano* v. *Goldfarb, supra,* at 208. The plurality opinion, in the circumstances there, found the discrimination violative of the Fifth Amendment's equal protection guarantee.

Frontiero v. *Richardson,* 411 U. S. 677 (1973), involved a similar discrimination. There, a serviceman could claim his wife as a dependent without regard to whether she was in fact dependent upon him and so obtain increased quarters allowances and medical and dental benefits. A servicewoman, on the other hand, could not claim her husband as a dependent for these purposes unless he was in fact dependent upon her for over one-half of his support. This discrimination, devaluing the service of the woman as compared with that of the man, was invalidated.

The Missouri law, as the Missouri courts recognized, also discriminates against men who survive their employed wives' dying in work-related accidents. To receive benefits, the surviving male spouse must prove his incapacity or dependency. The widow of a deceased wage earner, in contrast, is presumed dependent and is guaranteed a weekly benefit for life or until remarriage. It was this discrimination against the male survivor as compared with a similarly situated female that MR. JUSTICE STEVENS identified in *Califano* v. *Goldfarb, supra,* as resulting in a denial of equal protection.[5] 430 U. S., at 217–224 (opinion of STEVENS, J.).

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[5] As noted previously, see n. 3, *supra,* three state courts have recently held unconstitutional workers' compensation statutes with presumptions of dependency identical to that at issue in this case. In each of the three cases the court characterized the statute's discrimination as against both

III

However the discrimination is described in this case, our precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives. *Califano* v. *Westcott*, 443 U. S. 76, 85 (1979); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979); *Califano* v. *Webster*, 430 U. S. 313, 316–317 (1977); *Craig* v. *Boren*, 429 U. S. 190, 197 (1976).

Acknowledging that the discrimination involved here must satisfy the *Craig* v. *Boren* standard, 583 S. W. 2d, at 164–165, the Missouri Supreme Court stated that "the purpose of the [law] was to favor widows, not to disfavor them" and that when the law was passed in 1925 the legislature no doubt believed that "a widow was more in need of prompt payment of death benefits upon her husband's death without drawn-out proceedings to determine the amount of dependency than was a widower." *Id.*, at 168. Hence, the conclusive presumption of dependency satisfied "a perceived need widows generally had, which need was not common to men whose wives might be killed while working." *Ibid.* The survivor's "hardship was seen by the legislatur[e] as more immediate and pronounced on women than on men," and "the substantive difference in the economic standing of working men and women justifies the advantage that [the law] administratively gives to a widow." *Ibid.*

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working wives and surviving husbands. See *Arp* v. *Workers' Compensation Appeals Board*, 19 Cal. 3d, at 406, 563 P. 2d, at 855 ("[I]t is noteworthy that the conclusive presumption in favor of widows discriminates not only against the widower but against the employed *female* as well"); *Passante* v. *Walden Printing Co.*, 53 App. Div. 2d, at 12, 385 N. Y. S. 2d, at 181 (the statute "compels dissimilar treatment both for surviving husbands and working wives, respectively, vis-à-vis widows and working males"); *Tomarchio* v. *Township of Greenwich*, 75 N. J., at 75, 379 A. 2d, at 854 (statute unconstitutionally discriminates against both working women and surviving husbands).

Providing for needy spouses is surely an important governmental objective, *Orr* v. *Orr, supra,* at 280, and the Missouri statute effects that goal by paying benefits to all surviving female spouses and to all surviving male spouses who prove their dependency. But the question remains whether the discriminatory means employed—discrimination against women wage earners and surviving male spouses—itself substantially serves the statutory end. Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration? The only justification offered by the state court or appellees for not treating males and females alike, whether viewed as wage earners or survivors of wage earners, is the assertion that most women are dependent on male wage earners and that it is more efficient to presume dependency in the case of women than to engage in case-to-case determination, whereas individualized inquiries in the postulated few cases in which men might be dependent are not prohibitively costly.

The burden, however, is on those defending the discrimination to make out the claimed justification, and this burden is not carried simply by noting that in 1925 the state legislature thought widows to be more in need of prompt help than men or that today "the substantive difference in the economic standing of working men and women justifies the advantage" given to widows. 583 S. W. 2d, at 168. It may be that there is empirical support for the proposition that men are more likely to be the principal supporters of their spouses and families, *Weinberger* v. *Wiesenfeld,* 420 U. S., at 645, but the bare assertion of this argument falls far short of justifying gender-based discrimination on the grounds of administrative

convenience. Yet neither the court below nor appellees in this Court essay any persuasive demonstration as to what the economic consequences to the State or to the beneficiaries might be if, in one way or another, men and women, whether as wage earners or survivors, were treated equally under the workers' compensation law, thus eliminating the double-edged discrimination described in Part II of this opinion.

We think, then, that the claimed justification of administrative convenience fails, just as it has in our prior cases. In *Frontiero* v. *Richardson*, 411 U. S., at 689–690, the Government claimed that, as an empirical matter, wives are so frequently dependent upon their husbands and husbands so rarely dependent upon their wives that it was cheaper to presume wives to be dependent upon their husbands while requiring proof of dependency in the case of the male. The Court found the claimed justification insufficient to save the discrimination. And in *Reed* v. *Reed*, 404 U. S. 71, 76 (1971), the Court said "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause. . . ." See also *Califano* v. *Goldfarb*, 430 U. S., at 219–220 (opinion of STEVENS, J.). It may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause, but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers.

IV

Thus we conclude that the Supreme Court of Missouri erred in upholding the constitutional validity of § 287.240. We are left with the question whether the defect should be cured by extending the presumption of dependence to widowers or by eliminating it for widows. Because state legislation is at

issue, and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation. Accordingly, we reverse the decision of the Supreme Court of Missouri and remand the case to that court for further proceedings not inconsistent with this opinion.[6]

So ordered.

MR. JUSTICE REHNQUIST, continuing to believe that *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), was wrongly decided, and that constitutional issues should be more readily reexamined under the doctrine of *stare decisis* than other issues,

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[6] Appellees attempt to draw support from the fact that *Goldfarb* and *Wiesenfeld* arose in the context of the Social Security program. First, they argue, the statute at issue here, unlike a social insurance system that provides blanket survivorship benefits, seeks to compensate for specific economic loss to the worker or his dependents, and appellant can claim no such loss. Relatedly, a widower who suffers and can prove any loss of support is entitled to a corresponding level of benefits under § 287.240, whereas Mr. Goldfarb, under the Social Security Act provision, had to show that he had received at least one-half of his support from his wife at the time of her death. These arguments rely on the fact that covered widowers suffering provable economic loss will receive benefits corresponding to that loss under § 287.240, but they ignore the statute's discriminatory effect on working women by providing them with less protection for their families than working men. Appellees also argue that, unlike the Social Security program, the workers' compensation system is not based on mandatory contributions from past wage earnings of the employee. Thus appellant's late wife was not deprived of a portion of her earnings to contribute to a fund out of which her husband would not benefit. But we have before rejected the proposition that "the Constitution is indifferent to a statute that conditions the availability of noncontributory welfare benefits on the basis of gender," *Califano* v. *Westcott*, 443 U. S. 76, 85 (1979), and we refuse to part ways with our earlier decisions by applying a different standard of review in this case simply because the system is funded by employer rather than employee contributions.

dissents and would affirm the judgment of the Supreme Court of Missouri.

MR. JUSTICE STEVENS, concurring in the judgment.

Nothing has happened since the decision in *Califano* v. *Goldfarb*, 430 U. S. 199, to persuade me that this kind of gender-based classification can simultaneously disfavor the male class and the female class.

To illustrate my difficulty with the analysis in Part II of the Court's opinion, it should be noted that there are three relevant kinds of marriages: (1) those in which the husband is dependent on the wife; (2) those in which the wife is dependent on the husband; and (3) those in which neither spouse is dependent on the other.

Under the Missouri statute, in either of the first two situations, if the dependent spouse survives, a death benefit will be paid regardless of whether the survivor is male or female; conversely, if the working spouse survives, no death benefit will be paid. The only difference in the two situations is that the surviving male, unlike the surviving female, must undergo the inconvenience of proving dependency. That surely is not a discrimination against females.

In the third situation, if one spouse dies, benefits are payable to a surviving female but not to a surviving male. In my view, that is a rather blatant discrimination against males. While both spouses remain alive, the prospect of receiving a potential death benefit upon the husband's demise reduces the wife's need for insurance on his life, whereas the prospect of *not* receiving a death benefit upon the wife's demise increases the husband's need for insurance on her life. That difference again places the husband at a disadvantage.*

*There is no claim that the wage earner's take-home pay is affected by the Missouri statute. Whether the wage earner is single or married, and, if married, whether the other spouse is male or female, dependent or independent, the wage earner's pay is the same.

No matter how the statute is viewed, the class against which it discriminates is the male class. I therefore cannot join Part II of the Court's opinion. I do, however, agree that Missouri has failed to justify the disparate treatment of persons who have as strong a claim to equal treatment as do similarly situated surviving spouses, see *Califano* v. *Goldfarb*, *supra*, at 223 (STEVENS, J., concurring in judgment), and that its statute violates the Equal Protection Clause of the Fourteenth Amendment. For that reason I concur in the Court's judgment.

CITY OF ROME ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 78-1840. Argued October 10, 1979—Decided April 22, 1980

In 1966, appellant city of Rome, Ga., made certain changes in its electoral system, including provisions for majority rather than plurality vote for each of the nine members of the City Commission; for three numbered posts within each of the three (reduced from nine) wards; and for staggered terms for the commissioners and for members of the Board of Education from each ward; and a requirement that members of the Board reside in the wards from which they were elected. In addition, the city made 60 annexations between November 1, 1964, and February 10, 1975. Section 5 of the Voting Rights Act of 1965 (Act) requires preclearance by the Attorney General of the United States or the United States District Court for the District of Columbia of any change in a "standard, practice, or procedure with respect to voting" made after November 1, 1964, by jurisdictions that fall within the coverage formula set forth in § 4 (b) of the Act. Section 5 further provides that the Attorney General may clear a voting practice only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Georgia was designated a covered jurisdiction in 1965, and the municipalities of that State accordingly must comply with the preclearance procedure. Eventually, after at first having failed to do so, Rome submitted the annexations and the 1966 electoral changes for preclearance, but the Attorney General declined to preclear the above-enumerated electoral changes, concluding that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, such electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 annexations, finding that the city had not carried its burden of proving that the disapproved annexations would not dilute the Negro vote. Subsequently, however, in response to the city's motion for reconsideration, the Attorney General agreed to preclear the 13 annexations for Board of Education elections but still refused to preclear them for City Commission elections. The city and two of its officials then filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking relief from the Act based on a variety

of claims. A three-judge court rejected the city's arguments and granted summary judgment for the defendants, finding that the disapproved electoral changes and annexations, while not made for any discriminatory purpose, did have a discriminatory effect. The court refused to allow the city to "bail out" of the Act's coverage pursuant to § 4 (a), which allows a covered jurisdiction to escape § 5's preclearance requirement by bringing a declaratory judgment action and proving that no "test or device" has been used in the jurisdiction during the 17 years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

Held:

1. The city may not use § 4 (a)'s "bailout" procedure. In § 4 (a)'s terms, the issue depends on whether the city is either a "State with respect to which the determinations have been made" under § 4 (b) or a "political subdivision with respect to which such determinations have been made as a separate unit," and here the city fails to meet the definition of either term, since § 4 (b)'s coverage formula has never been applied to it. The city comes within the Act only because it is part of a covered State, and, hence, any "bailout" action to exempt the city must be filed by, and seek to exempt all of, the State. Moreover, the legislative history precludes any argument that § 4 (a)'s "bailout" procedure, made available to a covered "State," was also implicitly made available to political units in the State. Pp. 162–169.

2. The 60-day period under the Attorney General's regulation requiring requests for reconsideration of his refusal to preclear electoral changes to be decided within 60 days of their receipt, commences anew when the submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it. Thus, here, where the city, less than 60 days prior to the Attorney General's decision on the city's reconsideration motion, submitted, on its own accord, affidavits to supplement the motion, the Attorney General's response was timely. A contrary ruling that the 60-day period ran continuously from the date of the initial submission of the reconsideration motion would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion, and might be able to respond only by denying the reconsideration motion. Pp. 170–172.

3. By describing in § 5 the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent. Furthermore, Congress recognized this when, in 1975, it extended the Act for another seven years. Pp. 172–173.

4. The Act does not exceed Congress' power to enforce the Fifteenth Amendment. Under § 2 of that Amendment, Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate." Here, the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the Fifteenth Amendment's purposes, even if it is assumed that § 1 prohibits only intentional discrimination in voting. *South Carolina* v. *Katzenbach*, 383 U. S. 301. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create a risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. Pp. 173–178.

5. The Act does not violate principles of federalism. Principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation," *Fitzpatrick* v. *Bitzer*, 427 U. S. 445, such Amendments being specifically designed as an expansion of federal power and an intrusion on state sovereignty. Accordingly, Congress had the authority to regulate state and local voting through the provisions of the Act. Pp. 178–180.

6. There is no merit to appellants' contention that the Act and its preclearance requirement had outlived their usefulness by 1975, when Congress extended the Act for another seven years. In view of Congress' considered determination that at least another seven years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination, the extension of the Act was plainly a constitutional method of enforcing the Fifteenth Amendment. Pp. 180–182.

7. Nor is there any merit to the individual appellants' argument that, because no elections have been held in appellant city since 1974, their First, Fifth, Ninth, and Tenth Amendment rights as private citizens of the city have been abridged. Under circumstances where, upon the Attorney General's refusal to preclear the electoral changes, the city could have conducted elections under its prior electoral scheme, the city's failure to hold elections can only be attributed to its own officials, and not the operation of the Act. Pp. 182–183.

8. The District Court's findings that the city had failed to prove that the 1966 electoral changes and the annexations disapproved by the Attorney General did not have a discriminatory effect are not clearly erroneous. Pp. 183–187.

450 F. Supp. 378 and 472 F. Supp. 221, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. BLACKMUN, J., *post*, p. 187, and STEVENS, J., *post*, p. 190, filed concurring opinions. POWELL, J., filed a dissenting opinion, *post*, p. 193. REHNQUIST, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 206.

Robert M. Brinson argued the cause for appellants. With him on the briefs were *William E. Sumner* and *Joseph W. Dorn.*

Deputy Solicitor General Wallace argued the cause for appellees. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Elinor Hadley Stillman, Brian K. Landsberg, Walter W. Barnett, Mildred M. Matesich,* and *Mark L. Gross.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

At issue in this case is the constitutionality of the Voting Rights Act of 1965 and its applicability to electoral changes and annexations made by the city of Rome, Ga.

I

This is a declaratory judgment action brought by appellant city of Rome, a municipality in northwestern Georgia, under the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973 *et seq.* In 1970 the city had a population of 30,759, the racial composition of which was 76.6% white and 23.4% Negro. The voting-age population in 1970 was 79.4% white and 20.6% Negro.

The governmental structure of the city is established by a charter enacted in 1918 by the General Assembly of Georgia.

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*Briefs of *amici curiae* urging reversal were filed by *A. F. Summer*, Attorney General, and *Jerris Leonard* for the State of Mississippi; and by *Ronald A. Zumbrun, John H. Findley,* and *Raymond M. Momboisse* for the Pacific Legal Foundation.

Before the amendments at issue in this case, Rome's city charter provided for a nine-member City Commission and a five-member Board of Education to be elected concurrently on an at-large basis by a plurality of the vote. The city was divided into nine wards, with one city commissioner from each ward to be chosen in the citywide election. There was no residency requirement for Board of Education candidates.

In 1966, the General Assembly of Georgia passed several laws of local application that extensively amended the electoral provisions of the city's charter. These enactments altered the Rome electoral scheme in the following ways:

(1) the number of wards was reduced from nine to three;

(2) each of the nine commissioners would henceforth be elected at-large to one of three numbered posts established within each ward;

(3) each commissioner would be elected by majority rather than plurality vote, and if no candidate for a particular position received a majority, a runoff election would be held between the two candidates who had received the largest number of votes;

(4) the terms of the three commissioners from each ward would be staggered;

(5) the Board of Education was expanded from five to six members;

(6) each Board member would be elected at large, by majority vote, for one of two numbered posts created in each of the three wards, with runoff procedures identical to those applicable to City Commission elections;

(7) Board members would be required to reside in the wards from which they were elected;

(8) the terms of the two members from each ward would be staggered.

Section 5 of the Voting Rights Act of 1965 requires preclearance by the Attorney General or the United States District Court for the District of Columbia of any change in a

"standard, practice, or procedure with respect to voting," 42 U. S. C. § 1973c, made after November 1, 1964, by jurisdictions that fall within the coverage formula set forth in § 4 (b) of the Act, 42 U. S. C. § 1973b (b). In 1965, the Attorney General designated Georgia a covered jurisdiction under the Act, 30 Fed. Reg. 9897, and the municipalities of that State must therefore comply with the preclearance procedure, *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978).

It is not disputed that the 1966 changes in Rome's electoral system were within the purview of the Act. *E. g., Allen* v. *State Board of Elections*, 393 U. S. 544 (1969). Nonetheless, the city failed to seek preclearance for them. In addition, the city did not seek preclearance for 60 annexations made between November 1, 1964, and February 10, 1975, even though required to do so because an annexation constitutes a change in a "standard, practice, or procedure with respect to voting" under the Act, *Perkins* v. *Matthews*, 400 U. S. 379 (1971).

In June 1974, the city did submit one annexation to the Attorney General for preclearance. The Attorney General discovered that other annexations had occurred, and, in response to his inquiries, the city submitted all the annexations and the 1966 electoral changes for preclearance. The Attorney General declined to preclear the provisions for majority vote, numbered posts, and staggered terms for City Commission and Board of Education elections, as well as the residency requirement for Board elections. He concluded that in a city such as Rome, in which the population is predominately white and racial bloc voting has been common, these electoral changes would deprive Negro voters of the opportunity to elect a candidate of their choice. The Attorney General also refused to preclear 13 of the 60 annexations in question. He found that the disapproved annexations either contained predominately white populations of significant size

or were near predominately white areas and were zoned for residential subdivision development. Considering these factors in light of Rome's at-large electoral scheme and history of racial bloc voting, he determined that the city had not carried its burden of proving that the annexations would not dilute the Negro vote.

In response to the city's motion for reconsideration, the Attorney General agreed to clear the 13 annexations for School Board elections. He reasoned that his disapproval of the 1966 voting changes had resurrected the pre-existing electoral scheme and that the revivified scheme passed muster under the Act. At the same time, he refused to clear the annexations for City Commission elections because, in his view, the residency requirement for City Commission contained in the pre-existing electoral procedures could have a discriminatory effect.

The city and two of its officials then filed this action, seeking relief from the Act based on a variety of claims. A three-judge court, convened pursuant to 42 U. S. C. §§ 1973b (a) and 1973c, rejected the city's arguments and granted summary judgment for the defendants. 472 F. Supp. 221 (DC 1979). We noted probable jurisdiction, 443 U. S. 914 (1979), and now affirm.

II

We must first address the appellants' assertion that, for two reasons, this Court may avoid reaching the merits of this action.

A

The appellants contend that the city may exempt itself from the coverage of the Act. To evaluate this argument, we must examine the provisions of the Act in some detail.

Section 5 of the Act requires that a covered jurisdiction that wishes to enact any "standard, practice, or procedure with respect to voting different from that in force or effect on

November 1, 1964," must seek preclearance from the Attorney General or the United States District Court for the District of Columbia. 79 Stat. 439, as amended, 42 U. S. C. § 1973c.[1]

[1] In its entirety, § 5, as set forth in 42 U. S. C. § 1973c, provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the first sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the third sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objec-

Section 4 (a) of the Act, 79 Stat. 438, as amended, 42 U. S. C. § 1973b (a),[2] provides that the preclearance requirement of

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tion will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court."

[2] In its entirety, § 4 (a), as set forth in 42 U. S. C. § 1973b (a), provides:

"To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after August 6, 1965, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless

§ 5 is applicable to "any State" that the Attorney General has determined qualifies under the coverage formula of § 4 (b), 42

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the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

"An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment."

U. S. C. § 1973b (b),[3] and to "any political subdivision with respect to which such determinations have been made as a separate unit." As we have noted, the city of Rome comes within the preclearance requirement because it is a political unit in a covered jurisdiction, the State of Georgia. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978).

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[3] In its entirety, § 4 (b), as set forth in 42 U. S. C. § 1973b (b), provides:

"The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

"A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register."

Section 4 (a) also provides, however, a procedure for exemption from the Act. This so-called "bailout" provision allows a covered jurisdiction to escape the preclearance requirement of § 5 by bringing a declaratory judgment action before a three-judge panel of the United States District Court for the District of Columbia and proving that no "test or device" [4] has been used in the jurisdiction "during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The District Court refused to allow the city to "bail out" of the Act's coverage, holding that the political units of a covered jurisdiction cannot independently bring a § 4 (a) bailout action. We agree.

In the terms of § 4 (a), the issue turns on whether the city is, for bailout purposes, either a "State with respect to which the determinations have been made under the third sentence of subsection (b) of this section" or a "political subdivision with respect to which such determinations have been made as a separate unit," the "determinations" in each instance being the Attorney General's decision whether the jurisdiction falls within the coverage formula of § 4 (b). On the face of the statute, the city fails to meet the definition for either term, since the coverage formula of § 4 (b) has never been applied to it. Rather, the city comes within the Act because it is part of a covered State. Under the plain language of the statute, then, it appears that any bailout action to exempt the city must be filed by, and seek to exempt all of, the State of Georgia.

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[4] Section 4 (c) of the Act, as set forth in 42 U. S. C. § 1973b (c), provides:

"The phrase 'test or device' shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

The appellants seek to avoid this conclusion by relying on our decision in *United States* v. *Board of Commissioners of Sheffield, Ala., supra.* That decision, however, did not even discuss the bailout process. In *Sheffield,* the Court held that when the Attorney General determines that a State falls within the coverage formula of § 4 (b), any political unit of the State must preclear new voting procedures under § 5 regardless of whether the unit registers voters and therefore would otherwise come within the Act as a "political subdivision." [5] In so holding, the Court necessarily determined that the scope of §§ 4 (a) and 5 is "geographic" or "territorial," 435 U. S., at 120, 126, and thus that, when an entire State is covered, it is irrelevant whether political units of it might otherwise come under § 5 as "political subdivisions." 435 U. S., at 126–129.

Sheffield, then, did not hold that cities such as Rome are "political subdivisions" under §§ 4 and 5. Thus, our decision in that case is in no way inconsistent with our conclusion that, under the express statutory language, the city is not a "political subdivision" for purposes of § 4 (a) "bailout."

Nor did *Sheffield* suggest that a municipality in a covered State is itself a "State" for purposes of the § 4 (a) exemption procedure. *Sheffield* held that, based on the structure and purposes of the Act, the legislative history, and the contemporaneous interpretation of the Attorney General, the ambiguities of §§ 4 (a) and 5 should be resolved by holding that § 5's preclearance requirement for electoral changes by a covered "State" reached all such changes made by political units in that State. See 435 U. S., at 117–118. By contrast, in this

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[5] Section 14 (c) (2) of the Act, as set forth in 42 U. S. C. § 1973*l* (c) (2), provides:

"The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

case the legislative history precludes any argument that § 4 (a)'s bailout procedure, made available to a covered "State," was also implicitly made available to political units in the State. The House Commitee Report stated:

> "This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a separate unit; subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption." H. R. Rep. No. 439, 89th Cong., 1st Sess., 14 (1965).

The Senate Committee's majority Report is to the same effect:

> "We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition if any part of it is to be relieved from the requirements of section 4." S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 16 (1965).

See also *id.*, at 21. Bound by this unambiguous congressional intent, we hold that the city of Rome may not use the bailout procedure of § 4 (a).[6]

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[6] We also reject the appellants' argument that the majority vote, runoff election, and numbered posts provisions of the city's charter have already been precleared by the Attorney General because in 1968 the State of Georgia submitted, and the Attorney General precleared, a comprehensive Municipal Election Code that is now Title 34A of the Code of Georgia. Both the relevant regulation, 28 CFR § 51.10 (1979), and the decisions of this Court require that the jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act," *Allen* v. *State Board of Elections*, 393 U. S. 544, 571 (1969), and that the Attorney General be afforded an adequate opportunity to determine the purpose of the electoral changes and whether they will adversely affect minority voting in that jurisdiction, see *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, 137–138 (1978). Under this standard, the State's 1968 submission cannot be viewed as a submission of the city's 1966 electoral changes, for, as the District

B

The appellants next argue that its electoral changes have been precleared because of allegedly tardy action by the Attorney General. On May 21, 1976, the city asked the Attorney General to reconsider his refusal to preclear the electoral changes and the 13 annexations. On July 13, 1976, upon its own accord, the city submitted two additional affidavits. The Attorney General denied the motion to reconsider on August 12, 1976.

Section 5 of the Act provides that the Attorney General must interpose objections to original submissions within 60 days of their filing.[7] If the Attorney General fails to make a timely objection, the voting practices submitted become fully enforceable. By regulation, the Attorney General has provided that requests for reconsideration shall also be decided within 60 days of their receipt. 28 CFR § 51.3 (d) (1979).[8] If in the present case the 60-day period for reconsideration is computed as running continuously from May 24, the date of the initial submission of the reconsideration motion, the period expired before the Attorney General made his August 12 response. In contrast, if the period is measured from July 14,

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Court noted, the State's submission informed the Attorney General only of "its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts," and "did not . . . submit in an 'unambiguous and recordable manner' all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues." 472 F. Supp. 221, 233 (DC 1979).

[7] See n. 1, *supra*.

[8] This regulation provides:

"When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the submitting authority's request) whether to withdraw or to continue his objection."

the date the city supplemented its request, the Attorney General's response was timely.

The timing provisions of both the Act and the regulations are silent on the effect of supplements to requests for reconsideration. We agree with the Attorney General that the purposes of the Act and its implementing regulations would be furthered if the 60-day period provided by 28 CFR § 51.3 (d) were interpreted to commence anew when additional information is supplied by the submitting jurisdiction on its own accord.

The logic of *Georgia* v. *United States*, 411 U. S. 526 (1973), indicates that the Government's approach fully comports with the Act and regulations. In that case, the Court examined a regulation of the Attorney General, 28 CFR § 51.18 (a), that provided that § 5's mandatory 60-day period for consideration of original submissions is tolled whenever the Attorney General finds it necessary to request additional information from the submitting jurisdiction. Under the regulation, the 60-day period commences anew when the jurisdiction in question furnishes the requested information to the Attorney General. The Court upheld the regulation, holding that it was "wholly reasonable and consistent with the Act." 411 U. S., at 541.

Georgia v. *United States* stands for the proposition that the purposes of the Act are furthered if, once *all* information relevant to a submission is placed before the Attorney General, the Attorney General is accorded the full 60-day period provided by law in which to make his "difficult and complex" decision, *id.*, at 540. It follows, then, that when the submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it, as the city of Rome did in the present case, the 60-day period under 28 CFR § 51.3 (d) is commenced anew. A contrary ruling would mean that the Attorney General would, in some cases, be unable to give adequate consideration to materials submitted in piecemeal fashion. In such circumstances, the

Attorney General might be able to respond only by denying the reconsideration motion. Such a result would run counter to the purposes of the Act and regulations, since it would penalize submitting jurisdictions that have legitimate reasons to file supplementary materials.[9]

III

The appellants raise five issues of law in support of their contention that the Act may not properly be applied to the electoral changes and annexations disapproved by the Attorney General.

A

The District Court found that the disapproved electoral changes and annexations had not been made for any discriminatory purpose, but did have a discriminatory effect. The appellants argue that § 5 of the Act may not be read as prohibiting voting practices that have only a discriminatory effect. The appellants do not dispute that the plain language of § 5 commands that the Attorney General may clear a practice only if it "does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973c (emphasis added). By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent. Our decisions have consistently interpreted § 5 in this fashion. *Beer* v. *United States*, 425 U. S. 130, 141 (1976); *City of Richmond* v. *United States*, 422 U. S. 358, 372 (1975); *Georgia* v. *United States*, *supra*, at 538; *Perkins* v. *Matthews*, 400 U. S. 379, 387, 388 (1971). Furthermore, Congress recognized that the Act prohibited both discriminatory purpose and effect when, in 1975, it extended

[9] Because of our resolution of this issue, we need not address the Government's contention that the 60-day period provided by 28 CFR § 51.3 (d) is permissive rather than mandatory.

the Act for another seven years. S. Rep. No. 94–295, pp. 15–16 (1975) (hereinafter S. Rep.); H. R. Rep. No. 94–196, pp. 8–9 (1975) (hereinafter H. R. Rep.).

The appellants urge that we abandon this settled interpretation because in their view § 5, to the extent that it prohibits voting changes that have only a discriminatory effect, is unconstitutional. Because the statutory meaning and congressional intent are plain, however, we are required to reject the appellants' suggestion that we engage in a saving construction and avoid the constitutional issues they raise. See, *e. g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 499–501 (1979); *id.*, at 508–511 (BRENNAN, J., dissenting). Instead, we now turn to their constitutional contentions.

B

Congress passed the Act under the authority accorded it by the Fifteenth Amendment.[10] The appellants contend that the Act is unconstitutional because it exceeds Congress' power to enforce that Amendment. They claim that § 1 of the Amendment prohibits only purposeful racial discrimination in voting, and that in enforcing that provision pursuant to § 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect. We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination,[11] the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect.

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[10] The Amendment provides:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

[11] For purposes of this case it is unnecessary to examine the various approaches expressed by the Members of the Court in *City of Mobile* v. *Bolden*, *ante*, p. 55, decided this day.

The appellants are asking us to do nothing less than overrule our decision in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), in which we upheld the constitutionality of the Act. The Court in that case observed that, after making an extensive investigation, Congress had determined that its earlier attempts to remedy the "insidious and pervasive evil" of racial discrimination in voting had failed because of "unremitting and ingenious defiance of the Constitution" in some parts of this country. *Id.*, at 309. Case-by-case adjudication had proved too ponderous a method to remedy voting discrimination, and, when it had produced favorable results, affected jurisdictions often "merely switched to discriminatory devices not covered by the federal decrees." *Id.*, at 314. In response to its determination that "sterner and more elaborate measures" were necessary, *id.*, at 309, Congress adopted the Act, a "complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant," *id.*, at 315.

The Court then turned to the question whether the Fifteenth Amendment empowered Congress to impose the rigors of the Act upon the covered jurisdictions. The Court examined the interplay between the judicial remedy created by § 1 of the Amendment and the legislative authority conferred by § 2:

> "By adding this authorization [in § 2], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. 'It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective.' *Ex parte Virginia*, 100 U. S. 339, 345. Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." 383 U. S., at 325–326 (emphasis in original).

Congress' authority under § 2 of the Fifteenth Amendment, we held, was no less broad than its authority under the Necessary and Proper Clause, see *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819). This authority, as applied by longstanding precedent to congressional enforcement of the Civil War Amendments, is defined in these terms:

> " 'Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.' *Ex parte Virginia*, 100 U. S. [339,] 345–346." *South Carolina* v. *Katzenbach*, *supra*, at 327.

Applying this standard, the Court held that the coverage formula of § 4 (b), the ban on the use of literacy tests and related devices, the requirement that new voting rules must be precleared and must lack both discriminatory purpose and effect, and the use of federal examiners were all appropriate methods for Congress to use to enforce the Fifteenth Amendment. 383 U. S., at 329–337.

The Court's treatment in *South Carolina* v. *Katzenbach* of the Act's ban on literacy tests demonstrates that, under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect. The Court had earlier held in *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45 (1959), that the use of a literacy test that was fair on its face and was not employed in a discriminatory fashion did not violate § 1 of the Fifteenth Amendment. In upholding the Act's *per se* ban on such tests in *South Carolina* v. *Katzenbach*, the Court found no reason to overrule *Lassiter*. Instead, the Court recognized that the prohibition was an appropriate method of enforcing the Fifteenth Amendment

because for many years most of the covered jurisdictions had imposed such tests to effect voting discrimination and the continued use of even nondiscriminatory, fairly administered literacy tests would "freeze the effect" of past discrimination by allowing white illiterates to remain on the voting rolls while excluding illiterate Negroes. *South Carolina* v. *Katzenbach*, *supra*, at 334. This holding makes clear that Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination.

Other decisions of this Court also recognize Congress' broad power to enforce the Civil War Amendments. In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), the Court held that legislation enacted under authority of § 5 of the Fourteenth Amendment [12] would be upheld so long as the Court could find that the enactment " 'is plainly adapted to [the] end' " of enforcing the Equal Protection Clause and "is not prohibited by but is consistent with 'the letter and spirit of the constitution,' " regardless of whether the practices outlawed by Congress in themselves violated the Equal Protection Clause. 384 U. S., at 651 (quoting *McCulloch* v. *Maryland*, *supra*, at 421). The Court stated that, "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. Four years later, in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), the Court unanimously upheld a provision of the Voting Rights Act Amendments of 1970, Pub. L. 91–285, 84 Stat. 314, imposing a 5-year nationwide ban on literacy tests and similar requirements for registering to vote in state and federal elections. The Court concluded that Congress could rationally have

[12] Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

determined that these provisions were appropriate methods of attacking the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibited were discriminatory only in effect. See 400 U. S., at 132–133 (opinion of Black, J.); *id.*, at 144–147 (opinion of Douglas, J.); *id.*, at 216–217 (opinion of Harlan, J.); *id.*, at 231–236 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 282–284 (opinion of STEWART, J., joined by BURGER, C. J., and BLACKMUN, J.).[13]

It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch* v. *Maryland* and *Ex parte Virginia*, 100 U. S. 339 (1880). In the present case, we hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination,[14] it was proper to prohibit changes that have a discriminatory impact. See *South Carolina* v. *Katzenbach*, 383 U. S., at 335; *Oregon* v. *Mitchell*,

[13] There was no opinion for the Court in this case. Mr. Justice Douglas expressed the view that the legislation in question was authorized under § 5 of the Fourteenth Amendment. 400 U. S., at 144–147. The other eight Members of the Court believed that the Congress had permissibly acted within the authority provided it by § 2 of the Fifteenth Amendment. 400 U. S., at 132–133 (opinion of Black, J.); *id.*, at 216 (opinion of Harlan, J.); *id.*, at 232–234 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 283 (opinion of STEWART, J., joined by BURGER, C. J., and BLACKMUN, J.).

[14] See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 335, and n. 47 (1966) (citing H. R. Rep. No. 439, 89th Cong., 1st Sess., 10–11 (1965); S. Rep. No. 162, 89th Cong., 1st Sess., pt. 3, pp. 8, 12 (1965)).

supra, at 216 (opinion of Harlan, J.). We find no reason, then, to disturb Congress' considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from "'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer* v. *United States*, 425 U. S., at 140 (quoting H. R. Rep. No. 91–397, p. 8 (1969)).

C

The appellants next assert that, even if the Fifteenth Amendment authorized Congress to enact the Voting Rights Act, that legislation violates principles of federalism articulated in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). This contention necessarily supposes that *National League of Cities* signifies a retreat from our decision in *South Carolina* v. *Katzenbach*, *supra*, where we rejected the argument that the Act "exceed[s] the powers of Congress and encroach[es] on an area reserved to the States by the Constitution," 383 U. S., at 323, and determined that, "[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," *id.*, at 324. To the contrary, we find no inconsistency between these decisions.

In *National League of Cities*, the Court held that federal legislation regulating minimum wages and hours could not constitutionally be extended to employees of state and local governments. The Court determined that the Commerce Clause did not provide Congress the authority to enact legislation "directly displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions," 426 U. S., at 852, which, it held, included employer-employee relationships in programs traditionally conducted by States, *id.*, at 851–852.

The decision in *National League of Cities* was based solely on an assessment of congressional power under the Commerce Clause, and we explicitly reserved the question "whether different results might obtain if Congress seeks to affect inte-

gral operations of state governments by exercising authority granted it under other sections of the Constitution such as . . . § 5 of the Fourteenth Amendment." *Id.*, at 852, n. 17. The answer to this question came four days later in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). That case presented the issue whether, in spite of the Eleventh Amendment, Congress had the authority to bring the States as employers within the coverage of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and to provide that successful plaintiffs could recover retroactive monetary relief. The Court held that this extension of Title VII was an appropriate method of enforcing the Fourteenth Amendment:

> "[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." *Fitzpatrick* v. *Bitzer, supra,* at 456.

We agree with the court below that *Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Applying this principle, we hold that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights

Act.[15] *National League of Cities*, then, provides no reason to depart from our decision in *South Carolina* v. *Katzenbach* that "the Fifteenth Amendment supersedes contrary exertions of state power," 383 U. S., at 325, and that the Act is "an appropriate means for carrying out Congress' constitutional responsibilities," *id.*, at 308.[16]

D

The appellants contend in the alternative that, even if the Act and its preclearance requirement were appropriate means of enforcing the Fifteenth Amendment in 1965, they had outlived their usefulness by 1975, when Congress extended the Act for another seven years. We decline this invitation to overrule Congress' judgment that the 1975 extension was warranted.

In considering the 1975 extension, Congress acknowledged that, largely as a result of the Act, Negro voter registration had improved dramatically since 1965. H. R. Rep., at 6; S. Rep., at 13. Congress determined, however, that "a bleaker side of the picture yet exists." H. R. Rep., at 7; S. Rep., at 13. Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and

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[15] Indeed, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), strongly suggested this result by citing *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), as one of several cases sanctioning "intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a 'carv[ing] out' in *Ex parte Virginia*, [100 U. S. 339, 346 (1880)]." *Fitzpatrick* v. *Bitzer*, *supra*, at 455–456.

[16] See also *Katzenbach* v. *Morgan*, 384 U. S. 641, 646–647 (1966).

their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though "undeniable," had been "modest and spotty," extension of the Act was warranted. H. R. Rep., at 7–11; S. Rep., at 11–19.

Congress gave careful consideration to the propriety of readopting § 5's preclearance requirement. It first noted that "[i]n recent years the importance of this provision has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions." H. R. Rep., at 8; S. Rep., at 15. After examining information on the number and types of submissions made by covered jurisdictions and the number and nature of objections interposed by the Attorney General, Congress not only determined that § 5 should be extended for another seven years, it gave that provision this ringing endorsement:

> "The recent objections entered by the Attorney General . . . to Section 5 submissions clearly bespeak the continuing need for this preclearance mechanism. As registration and voting of minority citizens increases [*sic*], other measures may be resorted to which would dilute increasing minority voting strength.
>
> . . . . . .
>
> "The Committee is convinced that it is largely Section 5 which has contributed to the gains thus far achieved in minority political participation, and it is likewise Sect[i]on 5 which serves to insure that that progress not be destroyed through new procedures and techniques. Now is not the time to remove those preclearance protections from such limited and fragile success." H. R. Rep., at 10–11.

See also S. Rep., at 15–19.

It must not be forgotten that in 1965, *95 years* after ratification of the Fifteenth Amendment extended the right to vote

to all citizens regardless of race or color, Congress found that racial discrimination in voting was an "insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina* v. *Katzenbach*, 383 U. S., at 309. In adopting the Voting Rights Act, Congress sought to remedy this century of obstruction by shifting "the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.*, at 328. Ten years later, Congress found that a 7-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination. When viewed in this light, Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years of pervasive voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.

E

As their final constitutional challenge to the Act,[17] the individual appellants argue that, because no elections have been held in Rome since 1974, their First, Fifth, Ninth, and Tenth Amendment rights as private citizens of the city have been abridged. In blaming the Act for this result, these appellants identify the wrong culprit. The Act does not restrict private political expression or prevent a covered jurisdiction from holding elections; rather, it simply provides that elections may be held either under electoral rules in effect on November 1, 1964, or under rules adopted since that time that have been properly precleared. When the Attorney General refused to preclear the city's electoral changes, the city had the authority to conduct elections under its electoral scheme in effect on

[17] We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable. See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962).

November 1, 1964. Indeed, the Attorney General offered to preclear any technical amendments to the city charter necessary to permit elections under the pre-existing scheme or a modification of that scheme consistent with the Act. In these circumstances, the city's failure to hold elections can only be attributed to its own officials, and not to the operation of the Act.

IV

Now that we have reaffirmed our holdings in *South Carolina* v. *Katzenbach* that the Act is "an appropriate means for carrying out Congress' constitutional responsibilities" and is "consonant with all . . . provisions of the Constitution," 383 U. S., at 308, we must address the appellants' contentions that the 1966 electoral changes and the annexations disapproved by the Attorney General do not, in fact, have a discriminatory effect. We are mindful that the District Court's findings of fact must be upheld unless they are clearly erroneous.

A

We conclude that the District Court did not clearly err in finding that the city had failed to prove that the 1966 electoral changes would not dilute the effectiveness of the Negro vote in Rome.[18] The District Court determined that racial bloc voting existed in Rome. It found that the electoral changes from plurality-win to majority-win elections, numbered posts, and staggered terms, when combined with the presence of racial bloc voting and Rome's majority white population and at-large electoral system, would dilute Negro voting strength. The District Court recognized that, under the pre-existing plurality-win system, a Negro candidate would have a fair opportunity to be elected by a plurality of the vote

[18] Under § 5, the city bears the burden of proving lack of discriminatory purpose and effect. *Beer* v. *United States*, 425 U. S. 130, 140–141 (1976); *Georgia* v. *United States*, 411 U. S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U. S., at 335.

if white citizens split their votes among several white candidates and Negroes engage in "single-shot voting" in his favor.[19] The 1966 change to the majority vote/runoff election scheme significantly decreased the opportunity for such a Negro candidate since, "even if he gained a plurality of votes in the general election, [he] would still have to face the runner-up white candidate in a head-to-head runoff election in which, given bloc voting by race and a white majority, [he] would be at a severe disadvantage." 472 F. Supp., at 244 (footnotes omitted).[20]

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[19] Single-shot voting has been described as follows:

"Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." U. S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206–207 (1975).

[20] The District Court found that Rome's Negro citizens believed that a Negro will never be elected as long as the city's present electoral system remains in effect. 472 F. Supp., at 226. Only four Negroes have ever sought elective office in Rome, and none of them was elected. The campaign of the Reverend Clyde Hill, who made the strongest showing of the four, indicates both the presence of racial bloc voting in the city and the dilutive effect of the majority vote/runoff election scheme adopted in 1966. The city's elections were operated under that scheme when Rev. Hill ran for the Board of Education in 1970. With strong support from the Negro community, Rev. Hill ran against three white opponents and received 921 votes in the general election, while his opponents received 909, 407, and 143 votes, respectively. Rev. Hill, then, would have been elected under the pre-1966 plurality-win voting scheme. Under the majority-win/runoff election provisions adopted in 1966, however, a runoff election was held, and the white candidate who was the runner-up in the general election defeated Rev. Hill by a vote of 1409–1142.

The District Court's further conclusion that the city had failed to prove that the numbered posts, staggered terms, and Board of Education residency provisions would not have the effect of forcing head-to-head contests between Negroes and whites and depriving Negroes of the opportunity to elect a candidate by single-shot voting, *id.*, at 245, is likewise not clearly erroneous.[21] The District Court's holdings regarding all of the 1966 electoral changes are consistent with our statement in *Beer* v. *United States*, 425 U. S., at 141, that "the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral [process]."

B

The District Court also found that the city had failed to meet its burden of proving that the 13 disapproved annexations did not dilute the Negro vote in Rome. The

[21] In so holding, the District Court relied on this analysis by the United States Commission on Civil Rights:

"'There are a number of voting rules which have the effect of frustrating single-shot voting. . . . [I]nstead of having one race for four positions, there could be four races, each for only one position. Thus for post no. 1 there might be one black candidate and one white, with the white winning. The situation would be the same for each post, or seat—a black candidate would always face a white in a head-to-head contest and would not be able to win. There would be no opportunity for single-shot voting. A black still might win if there were more than one white candidate for a post, but this possibility would be eliminated if there was also a majority requirement.

"'[Second,] each council member might be required to live in a separate district but with voting still at large. This—just like numbered posts—separates one contest into a number of individual contests.

"'[Third,] the terms of council members might be staggered. If each member has a 4-year term and one member is elected each year, then the opportunity for single-shot voting will never arise.'" 472 F. Supp., at 244, n. 95 (quoting U. S. Commission on Civil Rights, *supra* n. 19, at 207–208).

city's argument that this finding is clearly erroneous is severely undermined by the fact that it failed to present any evidence shedding meaningful light on how the annexations affected the vote of Rome's Negro community.

Because Rome's failure to preclear any of these annexations caused a delay in federal review and placed the annexations before the District Court as a group, the court was correct in concluding that the cumulative effect of the 13 annexations must be examined from the perspective of the most current available population data. Unfortunately, the population data offered by the city was quite uninformative. The city did not present evidence on the current general population and voting-age population of Rome, much less a breakdown of each population category by race.[22] Nor does the record reflect current information regarding the city's registered voters. The record does indicate the number of Negro and white registered voters in the city as of 1975, but it is unclear whether these figures included persons residing in the annexed areas in dispute.

Certain facts are clear, however. In February 1978, the most recent date for which any population data were compiled, 2,582 whites and only 52 Negroes resided in the disapproved annexed areas. Of these persons, 1,797 whites and only 24

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[22] In *City of Richmond* v. *United States*, 422 U. S. 358 (1975), and *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), evidence of the racial composition of the general population was used to assess the impact of annexations on the importance of the Negro vote in the community. This information, when coupled with data on the racial composition of the community's voting-age population, provides more probative evidence in such cases than does voter registration data, which may perpetuate the effects of prior discrimination in the registration of voters, *Ely* v. *Klahr*, 403 U. S. 108, 115, n. 7 (1971); *Burns* v. *Richardson*, 384 U. S. 73, 92–93 (1966), or reflect a belief among the Negro population that it cannot elect a candidate of its choice, cf. n. 20, *supra*. Current voting-age population data are probative because they indicate the electoral potential of the minority community.

Negroes were of voting age, and 823 whites and only 9 Negroes were registered voters. We must assume that these persons moved to the annexed areas from outside the city, rather than from within the preannexation boundaries of the city, since the city, which bore the burden of proof, presented no evidence to the contrary.

The District Court properly concluded that these annexations must be scrutinized under the Voting Rights Act. See *Perkins* v. *Matthews*, 400 U. S., at 388–390. By substantially enlarging the city's number of white eligible voters without creating a corresponding increase in the number of Negroes, the annexations reduced the importance of the votes of Negro citizens who resided within the preannexation boundaries of the city. In these circumstances, the city bore the burden of proving that its electoral system "fairly reflects the strength of the Negro community as it exists after the annexation[s]." *City of Richmond* v. *United States*, 422 U. S., at 371. The District Court's determination that the city failed to meet this burden of proof for City Commission elections was based on the presence of three vote-dilutive factors: the at-large electoral system, the residency requirement for officeholders, and the high degree of racial bloc voting. Particularly in light of the inadequate evidence introduced by the city, this determination cannot be considered to be clearly erroneous.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion but write separately to state my understanding of the effect of the holding in Part IV–B. The Court there affirms, as not clearly erroneous, the District Court's determination that the city of Rome failed to meet its burden of disproving that the 13 disputed annexations had a discriminatory effect. That issue, for me, is close, but I accept the District Court's ruling. The holding, however,

does seem to have the anomalous result of leaving the voters residing in those annexed areas within the jurisdiction of Rome's Board of Education, but outside the jurisdiction of its City Commission.* As the appellees point out, however, Brief for Appellees 40–42, affirmance of the District Court's holding does not preclude the city from altering this anomaly.

It seems significant to me that the District Court adopted the remedial device of conditioning its approval of the annexations on Rome's abandonment of the residency requirement for City Commission elections. It thus denied the city's motion for approval of the annexations "without prejudice to renewal . . . upon the undertaking of suitable action consistent with the views expressed herein." 472 F. Supp. 221, 249 (DC 1979). This remedial device, conditioning the approval of annexations on the elimination of pre-existing discriminatory aspects of a city's electoral system, was developed in *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), and expressly approved by this Court in *City of Richmond* v. *United States*, 422 U. S. 358, 369–371 (1975).

I entertain some doubt about the District Court's apparent conclusion that the residency requirement for Commission elections, standing alone, would render the postannexation electoral system of Rome one that did not "fairly recogniz[e] the minority's political potential," within the meaning of *City of Richmond*. *Id.*, at 378. The discriminatory effect of a residency requirement in an at-large election system results from its necessary separation of one contest into a number of individual contests, thereby frustrating minority efforts to utilize effectively single-shot voting. See *ante*, at 185, n. 21.

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*The Attorney General, in response to the city's motion for reconsideration of its submissions, agreed to preclear the 13 annexations for purposes of Board of Education elections. That decision was based solely on the fact that there was no residency requirement for Board of Education elections under Rome's pre-1966 electoral rules. See *ante*, at 160, 162.

And in a city the size of Rome, one might reasonably conclude that a requirement that one Commission member reside in each of nine wards would have such an effect. The District Court failed to analyze, however, the impact of the Attorney General's preclearance of Rome's reduction of the number of wards in the city from nine to three. The potential for effective single-shot voting would not be frustrated by a requirement that three commissioners be elected from each of three wards, so long as candidates were not required to run for a particular "numbered post" within each ward. Given the Attorney General's preclearance of the reduction of the number of wards from nine to three, the latter requirement is one that the District Court should have considered in determining whether the presence of a residency requirement would necessarily lead to the conclusion that Rome's postannexation electoral system is one that does not fairly recognize the minority's political potential.

I do not dissent from the affirmance of the District Court's holding with respect to the annexations, however, because the appellees have conceded that Rome need not abandon its residency requirement in order to keep the annexed areas within the jurisdiction of the City Commission. Appellees state:

> "If the City wished to retain both a residency requirement and at-large elections, . . . it could couple its pre-1966 procedures with its subsequent shift to a system of electing three commissioners from each of three wards. (The Attorney General had not objected to the change from nine wards to three larger wards.) When candidates are running concurrently for three unnumbered positions in each of the three wards, without a majority-vote requirement, there can be no head-to-head contest, and single-shot voting by black voters would give them a chance to elect the candidate they supported." Brief for Appellees 41–42.

Thus, on the understanding that the Attorney General would not object to the District Court's approval of the annexations insofar as they expand the jurisdiction of the City Commission, if the city either eliminates the residency requirement and returns to a nine ward system, or retains the residency requirement and the three-ward system that has been in effect since 1966, I join in Part IV–B of the Court's opinion.

MR. JUSTICE STEVENS, concurring.

Although I join the Court's opinion, the dissenting opinions prompt me to emphasize two points that are crucial to my analysis of the case; both concern the statewide nature of the remedy Congress authorized when it enacted the Voting Rights Act of 1965. The critical questions are: (1) whether, as a statutory matter, Congress has prescribed a statewide remedy that denies local political units within a covered State the right to "bail out" separately; and (2) if so, whether, as a constitutional matter, such statewide relief exceeds the enforcement powers of Congress. If, as I believe, Congress could properly impose a statewide remedy and in fact did so in the Voting Rights Act, then the fact that the city of Rome has been innocent of any wrongdoing for the last 17 years is irrelevant; indeed, we may assume that there has never been any racial discrimination practiced in the city of Rome. If racially discriminatory voting practices elsewhere in the State of Georgia were sufficiently pervasive to justify the statewide remedy Congress prescribed, that remedy may be applied to each and every political unit within the State, including the city of Rome.

I

Section 5 of the Voting Rights Act imposes certain restrictions on covered States and their political subdivisions, as well as on political subdivisions in noncovered States that have been separately designated as covered by the Attorney General pursuant to § 4 (b) of the Act. Section 4 (a) of the Act

permits both States and separately designated political subdivisions in noncovered States to bail out of § 5's restrictions by demonstrating that they have not engaged in racially discriminatory voting practices for a period of 17 years. In *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110, the Court construed the word "State" as used in §§ 4 (a) and 5 to include all political units within a State even though they did not satisfy the statutory definition of a "political subdivision," [1] and even though that definition had been added to the statute for the express purpose of limiting coverage.[2]

My opinion that the *Sheffield* Court's construction of the Act was erroneous does not qualify the legal consequences of that holding. See *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 47 (STEVENS, J., concurring).[3] Nor does it prevent me from joining the Court's holding today that a political unit within a covered State is not entitled to bail out under § 4 (a).[4] For both the plain language of the statute

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[1] Section 14 (c) (2) of the Act, as set forth in 42 U. S. C. § 1973*l* (c) (2), provides:

"The term 'political subdivision' shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting."

[2] See 435 U. S., at 142–143 (STEVENS, J., dissenting).

[3] In any event, the city of Rome may be subject to § 5 even under the reasoning of my dissent in *Sheffield*. As noted above, political subdivisions (*i. e.*, counties and other subdivisions that register voters) in covered States are clearly subject to the restrictions of § 5. In this case the city of Rome registered voters from 1964 to 1969, when the responsibility was transferred to Floyd County, see Stipulation No. 5, App. 58. Thus, from 1965 to 1969, the city was clearly covered by the Act. Because it did not preclear the transfer of voting registration to the county, *ibid.*, it at least arguably remains a "political subdivision" for purposes of both §§ 4 (a) and 5.

[4] It should be noted that there is some tension between the Court's language in *Sheffield* and its statement today that *Sheffield* did not "suggest that a municipality in a covered State is itself a 'State' for purposes of

and its legislative history unambiguously indicate that only covered States and separately designated political subdivisions in noncovered States are entitled to take advantage of that provision. See § 4 (a) and H. R. Rep. No. 439, 89th Cong., 1st Sess., 14 (1965), quoted *ante*, at 169. The political subdivisions of a covered State, while subject to § 5's preclearance requirements, are not entitled to bail out in a piecemeal fashion; rather, they can only be relieved of their preclearance obligations if the entire State meets the conditions for a bailout.

Given the Court's decision in *Sheffield* that all political units in a covered State are to be treated for § 5 purposes as though they were "political subdivisions" of that State, it follows that they should also be treated as such for purposes of § 4 (a)'s bailout provisions. Moreover, even without the *Sheffield* decision, it would be illogical to deny separate bailout relief to larger political units such as counties—which are clearly "political subdivisions" as that term is defined in § 14 (c)(2)—and to grant it to smaller units such as municipalities and school boards.

II

The second question is whether Congress has the power to prescribe a statewide remedy for discriminatory voting prac-

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the § 4 (a) exemption procedure." See *ante*, at 168. Compare the latter statement with, *e. g.*, 435 U. S., at 128, where the Court stated that it was "wholly logical to interpret 'State . . . with respect to which' § 4 (a) is in effect as referring to all political units within it." See also *id.*, at 129, n. 17:

"Our Brother STEVENS' dissent misconceives the basis for the conclusion that § 5's terms are susceptible of an interpretation under which Sheffield is covered. We believe that the term 'State' can bear a meaning that includes all state actors within it and that, given the textual interrelationship between § 5 and § 4 (a) and the related purposes of the two provisions, such a reading is a natural one."

To the extent that the Court has disavowed the foregoing comments, I, of course, agree.

tices if it does not allow political units that can prove themselves innocent of discrimination to bail out of the statute's coverage. In Part III–B of its opinion, the Court explains why Congress, under the authority of § 2 of the Fifteenth Amendment, may prohibit voting practices that have a discriminatory effect in instances in which there is ample proof of a longstanding tradition of purposeful discrimination. I think it is equally clear that remedies for discriminatory practices that were widespread within a State may be applied to every governmental unit within the State even though some of those local units may have never engaged in purposeful discrimination themselves.[5] In short, Congress has the constitutional power to regulate voting practices in Rome, so long as it has the power to regulate such practices in the entire State of Georgia. Since there is no claim that the entire State is entitled to relief from the federal restrictions, Rome's separate claim must fail.

I therefore join the Court's opinion.

MR. JUSTICE POWELL, dissenting.

Two years ago this Court held that the term "State" in § 4 (a) of the Voting Rights Act includes all political subdivisions that control election processes, and that those sub-

[5] The same principle applies to a court's exercise of its remedial powers. Thus, in an antitrust action, a remedy may be appropriate even though it "curtail[s] the exercise of liberties that the [defendant] might otherwise enjoy." *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 697. Similarly, in constitutional cases, a court may impose a remedy that requires more of the defendant than the Constitution itself would require in the absence of any history of wrongdoing. See, *e. g.*, *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 40 (STEVENS, J., dissenting). The Court has recently applied this principle to school desegregation cases, holding that a systemwide remedy—as opposed to a remedy concentrating on specific instances of discrimination—may be justified by a prior history of pervasive, systemwide discrimination. *Columbus Board of Education* v. *Penick*, 443 U. S. 449; *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526.

divisions are subject to the requirement in § 5 of the Act that federal authorities preclear changes in voting procedures. *United States* v. *Board of Commissioners of Sheffield, Ala.*, 435 U. S. 110 (1978) (*Sheffield*). Today the Court concludes that those subdivisions are not within the term "State" when it comes to an action to "bail out" from the preclearance requirement. Because this decision not only conflicts with *Sheffield* but also raises grave questions as to the constitutionality of the Act, I dissent.

I

Although I dissent on statutory and constitutional grounds, the need to examine closely the Court's treatment of the Voting Rights Act is sharply illustrated by the facts of this case. In Rome, a city of about 30,000, approximately 15% of the registered voters are black. This case involves two types of local action affecting voting. First, in 1966 the Georgia Assembly established a majority vote requirement for the City Commission and the Board of Education, and reduced the number of election wards from nine to three. Under the new arrangement, three city commissioners and two members of the Board of Education are chosen from each ward for numbered posts.[1] Second, between 1964 and 1975 Rome completed 60 territorial annexations, 13 of which are at issue in this case. The annexations allegedly diluted the black vote in Rome by disproportionately adding white voters. But 9 of the 13 relevant tracts of land were completely unpopulated when they were taken over by the city. By 1978 the additional white voters in the annexed land had caused a net decline of 1% in the black share of Rome's electorate.[2]

[1] As part of the package of revisions, the Assembly increased the Board of Education from five to six members, eased voter registration requirements, and shifted registration responsibility to the county. 472 F. Supp. 221, 224 (DC 1979).

[2] The statistics on this question are not altogether satisfactory, since the 1978 population of the annexed areas must be compared to 1975

There is substantial conflict between the ultimate ruling of the three-judge District Court in this case and its findings of fact. That court made a finding that Rome has not employed a "literacy test or other device . . . as a prerequisite to voter registration during the past seventeen years," and that "in recent years there have been no other direct barriers to black voting in Rome." 472 F. Supp. 221, 224, 225 (DC 1979). The court observed that white officials have encouraged blacks to run for office, that there was no evidence of obstacles to political candidacy by blacks, and that a recent black contender for the Board of Education narrowly lost a runoff with 45% of the vote (in a city where blacks make up only 15% of the voters). Although no black has been elected to the municipal government, the court stated that the "white elected officials of Rome . . . are responsive to the needs and interests of the black community," and actively seek black political support.[3] *Id.*, at 225. Indeed, the District Court concluded that in Rome "the black community, if it chooses to vote as a group, can probably determine the outcome of many if not most contests." *Ibid.*

Despite these findings, the District Court refused to approve the annexations or the changes in voting procedures. The court held that the city had not proved that the annexations and voting changes did not reduce the political influence of Rome's blacks. *Id.*, at 245, 247. I have many reservations about that conclusion. I note in particular that a black candidate running under the challenged election rules commanded

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voter registration totals. Given that 16.6% of the city's voters were black in 1975, that percentage drops only to 15.6% after adding the 823 white voters and 9 black voters who lived in the annexed areas in 1978. See Brief for Appellees 38, n. 26.

[3] The District Court also noted that the city has "made an effort to upgrade some black neighborhoods," has subsidized the transit system which has a predominantly black ridership, and has hired a number of blacks for skilled and supervisory positions in the municipal government. 472 F. Supp., at 225.

three times the share of votes that the black community holds. Moreover, nine of the annexations at issue were of vacant land and thus had no effect at all on voting when they occurred. Nevertheless, I need not consider whether the District Court's ruling on the evidence is clearly erroneous. Rather, I cite the apparent factual inconsistencies of the holding below because they highlight how far the courts, including this Court, have departed from the original understanding of the Act's purpose and meaning.[4] Against this background, I address the substantive questions posed by this case.

II

Under § 4 (a) of the Voting Rights Act a State or political subdivision can attempt to end its preclearance obligations through a declaratory judgment action (or "bailout") in the District Court for the District of Columbia. 42 U. S. C. § 1973b (a). Bailout must be granted if the District Court finds that in that jurisdiction no "test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." *Ibid.* The District Court expressly found that the city of Rome meets this standard and that blacks participate actively in Rome's political life. See *supra*, at 195. These findings demonstrate that the city has satisfied both the letter and the spirit of the bailout provision. Nevertheless, the District Court held that as long as Georgia is covered by § 5 of the Act, the city of Rome may not alter any voting practice without the prior approval of federal authorities.[5]

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[4] The Court's opinion simply ignores the most relevant facts. In so doing, the Court averts its eyes from the central paradox of this case: Even though Rome has met every criterion established by the Voting Rights Act for protecting the political rights of minorities, the Court holds that the city must remain subject to preclearance.

[5] Section 5 permits two methods of preclearance. A local government may ask the District Court for the District of Columbia for a ruling that

The Court today affirms the decision of the District Court, and holds that no subdivision may bail out so long as its State remains subject to preclearance. This conclusion can be reached only by disregarding the terms of the statute as we have interpreted them before. Section 4 (a) makes bailout available to "such State or subdivision," language that refers back to the provision's ban on the use of literacy tests (i) "in any State" reached by § 4 (b) of the Act, or (ii) "in any political subdivision" which is covered "as a separate unit." [6] Because the entire State of Georgia is covered under § 4 (b), this case concerns the first category in that definition.[7] Thus the crucial language here, as in *Sheffield*, is § 4 (a)'s prohibition of tests or devices "in any State" covered under § 4 (b).

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the voting change is acceptable, or it may submit the change to the Attorney General for him to accept or reject within 60 days. 42 U. S. C. § 1973c. The administrative procedure is used almost exclusively, since it takes less time.

[6] Section 4 (a), as set forth in 42 U. S. C. § 1973b (a), provides in relevant part:

"To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device *in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit*, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by *such State or subdivision* against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. . . ." (Emphasis supplied.)

[7] Under § 4 (b), a State or political subdivision is subject to the Act if the Director of the Census finds that less than 50% of the eligible population voted in the last Presidential election, and the Attorney General determines that a discriminatory "test or device" was maintained in the jurisdiction in 1964. Those determinations, which are unreviewable, trigger the application of the preclearance requirement of § 5. 42 U. S. C. §§ 1973b (b), 1973c.

The *Sheffield* Court emphasized the territorial content of this key phrase. The Court reasoned that by referring to discriminatory practices "in" a State, Congress extended the ban on tests and devices to all political subdivisions with any control over voting. 435 U. S., at 120. Since the same language in § 4 (a) also defines the applicability of § 5, the Court continued, subdivisions must also be subject to preclearance. Consequently, federal authorities now must review all changes in local voting rules and regulations in States covered by the Act. 435 U. S., at 126–127.

The availability of a bailout action is defined by exactly the same phrase that the Court interpreted in *Sheffield*. In the bailout context, however, the Court today finds that the language does not reach political subdivisions. The Court thus construes the identical words in § 4 (a) to have one meaning in one situation and a wholly different sense when applied in another context. Such a protean construction reduces the statute to irrationality.

This irrationality is evident in the contrast between the rights of localities like Rome that are in States covered by § 4 (b), and those of covered local governments that are located in States not covered by the Act. Twenty-eight subdivisions in the latter group have bailed out from the preclearance obligation in six separate actions.[8] Yet the only

[8] *Counties of Choctaw and McCurtain, Okla.* v. *United States*, C. A. No. 76–1250 (DC May 12, 1978) (two counties); *New Mexico, Curry, McKinley and Otero Counties* v. *United States*, C. A. No. 76–0067 (DC July 30, 1976) (three counties); *Maine* v. *United States*, C. A. No. 75–2125 (DC Sept. 17, 1976) (13 municipalities and 5 "plantations"); *Wake County, N. C.* v. *United States*, C. A. No. 1198–66 (DC Jan. 23, 1967) (one county); *Elmore County, Idaho* v. *United States*, C. A. No. 320–66 (DC Sept. 22, 1966) (one county); *Apache, Navaho and Coconino Counties, Ariz.* v. *United States*, 256 F. Supp. 903 (DC 1966) (three counties). Three counties in New York City bailed out in 1972, *New York* v. *United States*, C. A. No. 2419–71 (DC Apr. 13, 1972), but the bailout order was rescinded two years later after a District Court found that the State had conducted elections in English only, thereby

difference between those governments and the city of Rome is that the State in which Rome is located is itself subject to the Voting Rights Act. There is no reasoned justification for allowing a subdivision in North Carolina to bail out but denying a similar privilege to a subdivision in Georgia when both have been found to be in full compliance with the bail-out criteria.

The District Court acknowledged, and the Court today does not deny, the "abstract force" of this argument. The argument nevertheless fails, according to the Court's opinion, for two reasons: (i) *Sheffield* "did not hold that cities such as Rome are 'political subdivisions' " or "States," but merely subjected such entities to the preclearance requirement of § 5; and (ii) congressional Reports accompanying the Voting Rights Act of 1965 state that bailout should not be available to a subdivision located in a State covered by the Act. *Ante*, at 168–169. Neither reason supports the Court's decision. That *Sheffield* did not identify cities like Rome as "States" or "political subdivisions" as defined by the Act does not answer the point that the construction of "State" in *Sheffield* should control the availability of bailout. Both in terms of logic and of fairness, if Rome must preclear it must also be free to bail out. Second, it is elementary that where the language of a statute is clear and unambiguous, there is no occasion to look at its legislative history. We resort to legislative materials only when the congressional mandate is unclear on its face.

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violating the Act. *New York* v. *United States*, C. A. No. 2419-71 (DC Jan. 18, 1974) (referring to *Torres* v. *Sachs*, C. A. No. 73-3921 (CES) (SDNY Sept. 27, 1973)), summarily aff'd, 419 U. S. 888 (1974).

Bailout was denied in one action involving a local subdivision, *Gaston County, N. C.* v. *United States*, 395 U. S. 285 (1969), and three were dismissed by stipulation of the parties, *Board of Commissioners, El Paso County, Colo.* v. *United States*, C. A. No. 77-0185 (DC No. 8, 1977); *Yuba County, Cal.* v. *United States*, C. A. No. 75-2170 (DC May 25, 1976); *Nash County, N. C.* v. *United States*, C. A. No. 1702-66 (DC Sept. 26, 1969).

Ex parte Collett, 337 U. S. 55, 61 (1949); *United States* v. *Oregon*, 366 U. S. 643, 648 (1961). Although "committee reports in particular are often a helpful guide to the meaning of ambiguous statutory language, even they must be disregarded if inconsistent with the plain language of the statute." *Gooding* v. *United States*, 416 U. S. 430, 468 (1974) (MARSHALL, J., dissenting).

After *Sheffield*, there can be little dispute over the meaning of "State" as used in § 4 (a): It includes all political subdivisions that exercise control over elections.[9] Accordingly, there is no basis for the Court's reliance on congressional statements that are inconsistent with the terms of the statute. If § 4 (a) imposes the burden of preclearance on Rome, the same section must also relieve that burden when the city can demonstrate its compliance with the Act's quite strict requirements for bailout.

III

There is, however, more involved here than incorrect construction of the statute. The Court's interpretation of § 4 (a) renders the Voting Rights Act unconstitutional as applied to the city of Rome. The preclearance requirement both intrudes on the prerogatives of state and local governments and abridges the voting rights of all citizens in States covered under the Act. Under § 2 of the Fifteenth Amendment, Congress may impose such constitutional deprivations only if it is acting to remedy violations of voting rights. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 327–328 (1966); *Katzenbach* v. *Morgan*, 384 U. S. 641, 667 (1966) (Harlan, J., dissenting). In view of the District Court finding that Rome has not denied or abridged the voting rights of blacks, the

[9] This construction applies to political subdivisions defined by § 14 (c) (2) of the Act, 42 U. S. C. § 1973*l* (c) (2), as well as to governments like Rome that do not fall within that statutory definition. Thus, under *Sheffield*'s statutory interpretation, all subdivisions in States covered by the Act should be entitled to bail out. The constitutional analysis of Part III, *infra*, reaches the same conclusion.

Fifteenth Amendment provides no authority for continuing those deprivations until the entire State of Georgia satisfies the bailout standards of § 4 (a).[10]

When this Court first sustained the Voting Rights Act of 1965, it conceded that the legislation was "an uncommon exercise of congressional power." *South Carolina* v. *Katzenbach*, *supra*, at 334. The Court recognized that preclearance under the Act implicates serious federalism concerns. 383 U. S., at 324–327. As MR. JUSTICE STEVENS noted in *Sheffield*, the statute's "encroachment on state sovereignty is significant and undeniable." 435 U. S., at 141 (dissenting opinion).[11] That encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.[12] Unless the federal structure pro-

[10] In view of the narrower focus of my approach to the statutory and constitutional issues raised in this case, I do not reach the broad analysis offered by MR. JUSTICE REHNQUIST's dissent.

[11] Other Justices have expressed the same concern. *E. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 358 (1966) (Black, J., concurring and dissenting); *Allen* v. *State Board of Elections*, 393 U. S. 544, 586, and n. 4 (1969) (Harlan, J., concurring in part and dissenting in part); see also *Georgia* v. *United States*, 411 U. S. 526, 545 (1973) (POWELL, J., dissenting).

In *National League of Cities* v. *Usery*, 426 U. S. 833, 856, n. 20 (1976), the Court noted that because political subdivisions "derive their authority and power from their respective States," their integrity, like that of the States, is protected by the principles of federalism.

[12] The federal system allocates primary control over elections to state and local officials. *Oregon* v. *Mitchell*, 400 U. S. 112, 125 (1970) (opinion of Black, J.); *id.*, at 201 (opinion of Harlan, J.); *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 (1959).

This Court has emphasized the importance in a democratic society of preserving local control of local matters. See *Milliken* v. *Bradley*, 418 U. S. 717, 744 (1974) (federal court control of local schools "would deprive the people of control of schools through their elected representatives"); *James* v. *Valtierra*, 402 U. S. 137, 143 (1971) (local referendum on public housing project "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures . . . and to lower tax revenues"). Preservation of local control, naturally

vides some protection for a community's ordering of its own democratic procedures, the right of each community to determine its own course within the boundaries marked by the Constitution is at risk. Preclearance also operates at an individual level to diminish the voting rights of residents of covered areas. Federal review of local voting practices reduces the influence that citizens have over policies directly affecting them, and strips locally elected officials of their autonomy to chart policy.

The Court in *South Carolina* v. *Katzenbach*, *supra*, did not lightly approve these intrusions on federalism and individual rights. It upheld the imposition of preclearance as a prophylactic measure based on the remedial power of Congress to enforce the Fifteenth Amendment. But the Court emphasized that preclearance, like any remedial device, can be imposed only in response to some harm. When Congress approved the Act, the Court observed, there was "reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act." 383 U. S., at 329. Since the coverage formula in § 4 (b) purported to identify accurately those jurisdictions that had engaged in voting discrimination, the imposition of preclearance was held to be justified "at least in the absence of proof that [the state or local government has] been free of substantial voting discrimination in recent years." 383 U. S., at 330.[13]

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enough, involves protecting the integrity of state and local governments. See *National League of Cities* v. *Usery*, *supra*, at 855; *Coyle* v. *Oklahoma*, 221 U. S. 559, 565 (1911).

[13] The Court found important confirmation of the rationality of the coverage formula in the fact that there was no evidence of "recent racial discrimination involving tests and devices" in States or subdivisions exempted from preclearance. 383 U. S., at 331.

This Court took a similar approach when it affirmed the temporary suspension of all literacy tests by Congress in 1970. *Oregon* v. *Mitchell*, *supra*. The entire Court agreed with Mr. Justice Black's view that

The Court in *South Carolina* v. *Katzenbach* emphasized, however, that a government subjected to preclearance could be relieved of federal oversight if voting discrimination in fact did not continue or materialize during the prescribed period.

> "Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding [statutorily defined period]." *Id.*, at 331.

Although this passage uses the term "overbreadth" in an unusual sense, the point is clear. As long as the bailout option is available, there is less cause for concern that the Voting Rights Act may overreach congressional powers by imposing preclearance on a nondiscriminating government. Without bailout, the problem of constitutional authority for preclearance becomes acute.

The Court today decrees that the citizens of Rome will not have direct control over their city's voting practices until the entire State of Georgia can free itself from the Act's restrictions. Under the current interpretation of the word "State" in § 4 (a), Georgia will have to establish not only that it has satisfied the standards in § 4 (a), but also that each and every one of its political subdivisions meets those criteria. This outcome makes every city and county in Georgia a hostage to the errors, or even the deliberate intransigence, of a single sub-

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the congressional action was justified by the "long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." 400 U. S., at 132. See *id.*, at 146 (opinion of Douglas, J.); *id.*, at 216, and n. 94 (opinion of Harlan, J.); *id.*, at 234–235 (opinion of BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 284 (opinion of STEWART, J.). That history supported temporary suspension of those few literacy tests still in use, see *id.*, at 147 (opinion of Douglas, J.), without providing any bailout-like option. In contrast, preclearance involves a broad restraint on all state and local voting practices, regardless of whether they have been, or even could be, used to discriminate.

division.[14] Since the statute was enacted, only one State has succeeded in bailing out—Alaska in 1966, and again in 1971.[15] That precedent holds out little or no hope for more populous States such as Georgia. Demonstrating a right to bailout in 1966 for Alaska's 272,000 people and 56 political subdivisions, or in 1971 for that State's 302,000 people and 60 subdivisions, is a far cry from seeking bailout now on behalf of Georgia's approximately 5 million people and 877 local governments.[16]

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[14] Tr. of Oral Arg. 38. The Court's position dictates this eccentric result by insisting that subdivisions in covered States can be relieved of preclearance only when their State bails out. In my view this also would cast serious doubt on the Act's constitutionality as applied to any State which could not bail out due to the failings of a single subdivision. A rational approach would treat the state and local governments independently for purposes of bailout. If subdivisions in Georgia were free to seek bailout on their own, then a bailout action by the State could properly focus on the State's voting policies. Then, if Georgia were entitled to bail out, preclearance would continue to apply to subdivisions that by their own noncompliance met the coverage criteria of § 4 (b). Of course, the situation would be different if the State had contributed, overtly or covertly, to the subdivision's failure to comply.

[15] *Alaska* v. *United States*, C. A. No. 101–66 (DC Aug. 17, 1966); *Alaska* v. *United States*, C. A. No. 2122–71 (DC Mar. 10, 1972). Alaska's 1971 suit was prompted by recoverage of the State under the Act in the 1970 extension. The 1975 extension of the Act also re-established coverage of Alaska, which filed but abandoned yet another bailout suit. *Alaska* v. *United States*, C. A. No. 78–0484 (DC May 10, 1979) (stipulated dismissal of action).

One other State—Virginia—has attempted to bail out under § 4 (a). *Virginia* v. *United States*, 386 F. Supp. 1319 (DC 1974), summarily aff'd, 420 U. S. 901 (1975). The court held that Virginia did not satisfy § 4 (a) because a state literacy test administered in some localities between 1963 and 1965 was discriminatory in the context of the inferior education offered to Virginia blacks in certain rural counties before that period.

[16] The Solicitor General states that Georgia has 159 counties, 530 municipalities, and 188 other subdivisions that now must preclear every voting change, no matter how irrelevant the change might be to discrimination in voting. App. to Brief for Appellees 1a.

Today's ruling therefore will seal off the constitutionally necessary safety valve in the Voting Rights Act.

The preclearance requirement enforces a presumption against voting changes by certain state and local governments. If that presumption is restricted to those governments meeting § 4 (b)'s coverage criteria, and if the presumption can be rebutted by a proper showing in a bailout suit, the Act may be seen, as the *South Carolina* v. *Katzenbach* Court saw it, as action by Congress at the limit of its authority under the Fifteenth Amendment. But if governments like the city of Rome may not bail out, the statute oversteps those limits. For these reasons, I would reverse the judgment of the District Court.[17]

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[17] On a practical level, the District Court argued that since more than 7,000 subdivisions currently are required to preclear voting changes, bailout suits by a small percentage of those subdivisions would swamp that court. 472 F. Supp., at 231–232. In view of the acknowledged difficulties that confront a local government in seeking bailout in the District of Columbia, it is by no means self-evident that the "floodgates" perceived by the court would ever open. Such suits, involving substantial expense as well as uncertainty, would not likely be initiated unless there were a substantial likelihood of success. Moreover, the court's argument ignores the procedures of a bailout suit. Section 4 (a) directs the Attorney General not to contest bailout if he finds that the state or local government has not used a discriminatory test or device over the preceding 17 years. 42 U. S. C. § 1973b (a). In fact, the Attorney General consented to bailout in the nine actions under § 4 (a) that have succeeded, while only three bailout suits have gone to trial. See nn. 8 and 15, *supra*. Thus the Department of Justice, not the courts, would shoulder much of the added burden that might arise from recognizing a bailout right for governments like the city of Rome. That burden could hardly be more onerous than the Attorney General's present responsibility for preclearing all voting changes in 7,000 subdivisions. In the first six months of 1979 over 3,200 such voting changes were submitted to the Attorney General, a rate of more than 25 per working day. Letter to Joseph W. Dorn from Drew S. Days III, Assistant Attorney General, Civil Rights Division, U. S. Department of Justice (Aug. 3, 1979), reprinted in App. to Brief for Appellants 1c.

These astonishing figures compare unfavorably with those cited by MR. JUSTICE STEVENS in his *Sheffield* dissent, where he questioned the efficacy of

IV

If there were reason to believe that today's decision would protect the voting rights of minorities in any way, perhaps this case could be viewed as one where the Court's ends justify dubious analytical means. But the District Court found, and no one denies, that for at least 17 years there has been no voting discrimination by the city of Rome. Despite this record, the Court today continues federal rule over the most local decisions made by this small city in Georgia. Such an outcome must vitiate the incentive for any local government in a State covered by the Act to meet diligently the Act's requirements. Neither the Framers of the Fifteenth Amendment nor the Congress that enacted the Voting Rights Act could have intended that result.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART joins, dissenting.

We have only today held that the city of Mobile does not violate the Constitution by maintaining an at-large system of electing city officials unless voters can prove that system is a product of purposeful discrimination. *City of Mobile* v. *Bolden, ante,* p. 55. This result is reached even though the black residents of Mobile have demonstrated that racial "bloc" voting has prevented them from electing a black representative to the city government. The Court correctly concluded that a city has no obligation under the Constitution

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the Attorney General's review of preclearance requests that then were arriving at the rate of only four a day. *United States* v. *Board of Commissioners of Sheffield, Ala.,* 435 U. S. 110, 147–148, and nn. 8, 10 (1978). See *Berry* v. *Doles,* 438 U. S. 190, 200–201 (1978) (POWELL, J., concurring in judgment). It hardly need be added that no senior officer in the Justice Department—much less the Attorney General—could make a thoughtful, personal judgment on an average of *25* preclearance petitions per day. Thus, important decisions made on a democratic basis in covered subdivisions and States are finally judged by unidentifiable employees of the federal bureaucracy, usually without anything resembling an evidentiary hearing.

to structure its representative system in a manner that maximizes the black community's ability to elect a black representative. Yet in the instant case, the city of Rome is prevented from instituting precisely the type of structural changes which the Court says Mobile may maintain consistently with the Civil War Amendments, so long as their purpose be legitimate, because Congress has prohibited these changes under the Voting Rights Act as an exercise of its "enforcement" power conferred by those Amendments.

It is not necessary to hold that Congress is limited to merely providing a forum in which aggrieved plaintiffs may assert rights under the Civil War Amendments in order to disagree with the Court's decision permitting Congress to straitjacket the city of Rome in this manner. Under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment, Congress is granted only the power to "enforce" by "appropriate" legislation the limitations on state action embodied in those Amendments. While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities. *Marbury* v. *Madison*, 1 Cranch 137 (1803); *United States* v. *Nixon*, 418 U. S. 683 (1974). Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.

I

The facts of this case readily demonstrate the fallacy underlying the Court's determination that congressional prohibition of Rome's conduct can be characterized as enforcement of the Fourteenth or Fifteenth Amendment.[1] The

[1] The Voting Rights Act is generally viewed as an exercise of Fifteenth Amendment power. See *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). Since vote "dilution" devices are in issue in this case, the rights

three-judge District Court entered extensive findings of fact—facts which are conspicuously absent from the Court's opinion. The lower court found that Rome has not employed any discriminatory barriers to black voter registration in the past 17 years. Nor has the city employed any other barriers to black voting or black candidacy. Indeed, the court found that white elected officials have encouraged blacks to run for elective posts in Rome, and are "responsive to the needs and interests of the black community." The city has not discriminated against blacks in the provision of services and has made efforts to upgrade black neighborhoods.

It was also established that although a black has never been elected to political office in Rome, a black was appointed to fill a vacancy in an elective post. White candidates vigorously pursue the support of black voters. Several commissioners testified that they spent proportionately more time campaigning in the black community because they "needed that vote to win." The court concluded that "blacks often hold the balance of power in Rome elections."

Despite this political climate, the Attorney General refused to approve a number of city annexations and various changes in the electoral process. The city sought to require majority vote for election to the City Commission and Board of Education; to create numbered posts and staggered terms for those elections; and to establish a ward residency requirement for Board of Education elections. In addition, during the years

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at stake are more properly viewed as Fourteenth Amendment rights. See *City of Mobile* v. *Bolden*, *ante*, p. 55. Nevertheless, this Court has upheld the constitutionality of the Act if it is applied to remedy violations of the Fourteenth Amendment. *Gaston County* v. *United States*, 395 U. S. 285, 290, n. 5 (1969). Moreover, the nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive. See, *e. g.*, *United States* v. *Guest*, 383 U. S. 745, 784 (1966) (opinion of BRENNAN, J.); *James* v. *Bowman*, 190 U. S. 127 (1903). For this reason, it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers for the purposes of this opinion.

between 1964 and 1973, the city effected 60 annexations. Appellees concede that none of the annexations were sought for discriminatory purposes. All of the electoral changes and 13 of the annexations were opposed by the Attorney General on the grounds that their adoption would lessen the likelihood that blacks would be successful in electing a black city official, assuming racial-bloc voting on the part of both whites and blacks. Each of the changes was considered to be an impermissible "vote-dilution" device.

Rome sought judicial relief and the District Court found that the city had met its burden of proving that these electoral changes and annexations were *not* enacted with the purpose of discriminating against blacks. The changes were nevertheless prohibited because of their perceived disparate effect.[2]

II

The Court holds today that the city of Rome can constitutionally be compelled to seek congressional approval for most of its governmental changes even though it has not engaged in any discrimination against blacks for at least 17 years. Moreover, the Court also holds that federal approval can be constitutionally denied even after the city has proved that the changes are not purposefully discriminatory. While I agree with MR. JUSTICE POWELL's conclusion that requiring localities to *submit* to preclearance is a significant intrusion on local autonomy, it is an even greater intrusion on that autonomy to *deny* preclearance sought.

The facts of this case signal the necessity for this Court to carefully scrutinize the alleged source of congressional power to intrude so deeply in the governmental structure of the municipal corporations created by some of the 50 States. Section 2 of the Fifteenth Amendment and § 5 of the Four-

[2] I share MR. JUSTICE POWELL's observation that the factual conclusions respecting the discriminatory effect of the annexations are highly questionable. *Ante*, at 195–196. I rest my dissent, however, on somewhat broader grounds.

teenth provide that Congress shall have the power to "enforce" § 1 "by appropriate legislation." Congressional power to prohibit the electoral changes proposed by Rome is dependent upon the scope and nature of that power. There are three theories of congressional enforcement power relevant to this case. First, it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation. It has never been seriously maintained, however, that Congress can do no more than the judiciary to enforce the Amendments' commands. Thus, if the electoral changes in issue do not violate the Constitution, as judicially interpreted, it must be determined whether Congress could nevertheless appropriately prohibit these changes under the other two theories of congressional power. Under the second theory, Congress can act remedially to enforce the judicially established substantive prohibitions of the Amendments. If not properly remedial, the exercise of this power could be sustained only if this Court accepts the premise of the third theory that Congress has the authority under its enforcement powers to determine, without more, that electoral changes with a disparate impact on race violate the Constitution, in which case Congress by a legislative Act could effectively amend the Constitution.

I think it is apparent that neither of the first two theories for sustaining the exercise of congressional power supports this application of the Voting Rights Act. After our decision in *City of Mobile* there is little doubt that Rome has not engaged in *constitutionally* prohibited conduct.[3] I also do not

[3] At least four Members of the Court in *Mobile* held that purposeful discrimination would be prerequisite to establishing a constitutional violation in a case alleging vote dilution under the Fourteenth and Fifteenth Amendments. *Ante*, at 66–68 (opinion of STEWART, J.). While a majority of the Court might adopt this view, see *ante*, at 94 (opinion of WHITE, J.), the voting procedures adopted by Rome would appear to readily meet the standards of constitutionality established by MR. JUSTICE STEVENS. See *ante*, at 90.

believe that prohibition of these changes can genuinely be characterized as a remedial exercise of congressional enforcement powers. Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution. This result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government. See *United States* v. *Nixon,* 418 U. S. 683 (1974); *Marbury* v. *Madison,* 1 Cranch 137 (1803).

A

If the enforcement power is construed as a "remedial" grant of authority, it is this Court's duty to ensure that a challenged congressional Act does no more than "enforce" the limitations on state power established in the Fourteenth and Fifteenth Amendments. *Marbury* v. *Madison.* The Court has not resolved the question of whether it is an appropriate exercise of remedial power for Congress to prohibit local governments from instituting structural changes in their government, which although not racially motivated, will have the effect of decreasing the ability of a black voting bloc to elect a black candidate.

This Court has found, as a matter of statutory interpretation, that Congress intended to prohibit governmental changes on the basis of no more than disparate impact under the Voting Rights Act. These cases, however, have never directly presented the constitutional questions implicated by the lower court finding in this case that the city has engaged in no purposeful discrimination in enacting these changes, or otherwise, for almost two decades. See *Beer* v. *United States,* 425 U. S. 130 (1976); *City of Richmond* v. *United States,* 422 U. S. 358 (1975); *Perkins* v. *Matthews,* 400 U. S. 379 (1971); *Fairley* v. *Patterson,* decided together with *Allen* v. *State Board of Elections,* 393 U. S. 544 (1969). In none of these cases was the Court squarely presented with a constitutional challenge to congressional power to prohibit state electoral

practices after the locality has *disproved* the existence of any purposeful discrimination.[4]

The cases in which this Court has actually examined the constitutional questions relating to Congress' exercise of its powers to enforce the Fourteenth and Fifteenth Amendments also did not purport to resolve this issue.[5] But the principles which can be distilled from those precedents require the conclusion that the limitations on state power at issue cannot be sustained as a remedial exercise of power.

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[4] In *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), summarily aff'd, 410 U. S. 962 (1973), the District Court did find that an annexation scheme could be prohibited solely on the basis of its disparate impact, without a finding of purposeful discrimination on the part of the local government. *Petersburg* cannot be considered dispositive of the question presented in this case, however. The court did not address any possible constitutional difficulties with its conclusion, and thus it is not clear that these arguments were raised by the parties. An unexplicated summary affirmance by this Court affirms only the judgment, not the reasoning, of the District Court. See *Hicks* v. *Miranda*, 422 U. S. 332 (1975).

[5] This issue was also not squarely presented or resolved in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977). In *UJO*, the issue was whether the State could constitutionally take racial criteria into account in drawing its district lines where such redistricting was not strictly necessary to eliminate the effects of past discriminatory districting or apportionment. The Court found that use of these criteria was proper, for differing reasons. In an opinion by MR. JUSTICE WHITE, joined by three other Members of the Court, it was suggested in part that the Voting Rights Act could constitutionally require this. The only question, however, was the constitutionality of state use of racial criteria, vis-à-vis other citizens, and not the constitutionality of congressional Acts which required state governments to use racial criteria against their will. In another part of the opinion, MR. JUSTICE WHITE reasoned that "the State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls." *Id.*, at 167. While States may be empowered to voluntarily use racial criteria in order to minimize the effects of racial-bloc voting, that conclusion does not determine the constitutional authority of Congress to require States to use racial criteria in structuring their governments.

While the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination, the decisions of this Court have recognized that in some circumstances, congressional prohibition of state or local action which is not purposefully discriminatory may nevertheless be appropriate remedial legislation under the Civil War Amendments. See *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *Gaston County* v. *United States*, 395 U. S. 285 (1969).

Those circumstances, however, are not without judicial limits. These decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is "appropriate" legislation "to enforce" the Civil War Amendments if that prohibition is necessary to remedy prior constitutional violations by the governmental unit, or if necessary to effectively prevent purposeful discrimination by a governmental unit. In both circumstances, Congress would still be legislating in response to the incidence of state action violative of the Civil War Amendments. These precedents are carefully formulated around a historic tenet of the law that in order to invoke a remedy, there must be a wrong—and under a remedial construction of congressional power to enforce the Fourteenth and Fifteenth Amendments, that wrong must amount to a constitutional violation. Only when the wrong is identified can the appropriateness of the remedy be measured.

The Court today identifies the constitutional wrong which was the object of this congressional exercise of power as purposeful discrimination by local governments in structuring their political processes in an effort to reduce black voting strength. The Court goes on to hold that the prohibitions imposed in this case represent an "appropriate" means of preventing such constitutional violations. The Court does not rest this conclusion on any finding that this prohibition is necessary to remedy any prior discrimination by the locality. Rather, the Court reasons that prohibition of changes dis-

criminatory in effect prevent the incidence of changes which are discriminatory in purpose:

> "Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact." *Ante*, at 177.

What the Court explicitly ignores is that in this case the city has proved that these changes are not discriminatory in purpose. Neither reason nor precedent supports the conclusion that here it is "appropriate" for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is *not* purposeful discrimination.

Congress had before it evidence that various governments were enacting electoral changes and annexing territory to prevent the participation of blacks in local government by measures other than outright denial of the franchise.[6] Congress could of course remedy and prevent such purposeful discrimination on the part of local governments. See *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960). And given the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. See *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966). But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption. Absent other circumstances, it would be a topsy-turvy judicial system which held that electoral changes

[6] See the reference to the legislative history in *United Jewish Organizations* v. *Carey*, *supra*, at 158.

which have been affirmatively proved to be permissible under the Constitution nonetheless violate the Constitution.

The precedent on which the Court relies simply does not support its remedial characterization. Neither *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), nor *South Carolina* v. *Katzenbach*, *supra*, legitimizes the use of an irrebuttable presumption that "vote-diluting" changes are motivated by a discriminatory animus. The principal electoral practice in issue in those cases was the use of literacy tests. Yet, the Court simply fails to make any inquiry as to whether the particular electoral practices in issue here are encompassed by the "preventive" remedial rationale invoked in *South Carolina* and *Oregon*. The rationale does support congressional prohibition of some electoral practices, but simply has no logical application to the "vote-dilution" devices in issue.

In *Oregon*, the Court sustained a nationwide prohibition of literacy tests, thereby extending the more limited suspension approved in *South Carolina*. By upholding this congressional measure, the Court established that under some circumstances, a congressional remedy may be constitutionally overinclusive by prohibiting some state action which might not be purposefully discriminatory. That possibility does not justify the overinclusiveness countenanced by the Court in this case, however. *Oregon* by no means held that Congress could simply use discriminatory effect as a proxy for discriminatory purpose, as the Court seems to imply. Instead, the Court opinions identified the factors which rendered this prohibition properly remedial. The Court found the nationwide ban to be an appropriate means of effectively preventing purposeful discrimination in the application of the literacy tests as well as an appropriate means of remedying prior constitutional violations by state and local governments in the administration of education to minorities.

The presumption that the literacy tests were either being used to purposefully discriminate, or that the disparate effects of those tests were attributable to discrimination in state-

administered education was not very wide of the mark. Various opinions of the Court noted that at the time that Congress enacted the ban, few States were utilizing literacy tests, 400 U. S., at 147 (opinion of Douglas, J.), and the voter registration statistics available within those States suggested that a disparate effect was prevalent. *Id.*, at 132–133 (opinion of Black, J.). Even if not adopted with a discriminatory purpose, the tests could readily be applied in a discriminatory fashion. Thus a demonstration by the State that it sought to reinstate the tests for legitimate purposes did not eliminate the substantial risk of discrimination in application. Only a ban could effectively prevent the occurrence of purposeful discrimination.

The nationwide ban was also found necessary to effectively remedy past constitutional violations. Without the nationwide ban, a voter who was illiterate due to state discrimination in education could be denied the right to vote on the basis of his illiteracy when he moved into a jurisdiction retaining a literacy test for nondiscriminatory purposes. *Id.*, at 283–284. Finally, MR. JUSTICE STEWART found that a uniform prohibition had definite advantages for enforcement and federal relations: it reduced tensions with particular regions, and it relieved the Federal Government from the administrative burden implicated by selective state enforcement.

Presumptive prohibition of vote-diluting procedures is not similarly an "appropriate" means of exacting state compliance with the Civil War Amendments. First, these prohibitions are quite unlike the literacy ban, where the disparate effects were traceable to the discrimination of governmental bodies in education even if their present desire to use the tests was legitimate. See *Gaston County* v. *United States*, 395 U. S. 285 (1969). Any disparate impact associated with the nondiscriminatory electoral changes in issue here results from bloc voting—private rather than governmental discrimi-

nation. It is clear therefore that these prohibitions do not implicate congressional power to devise an effective remedy for prior constitutional violations by local governments. Nor does the Court invoke this aspect of congressional remedial powers.

It is also clear that while most States still utilizing literacy tests may have been doing so to discriminate, a similar generalization could not be made about all government structures which have some disparate impact on black voting strength. At the time Congress passed the Act, one study demonstrated that 60% of all cities nationwide had at-large elections for city officials, for example. This form of government was adopted by many cities throughout this century as a reform measure designed to overcome wide-scale corruption in the ward system of government. See Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 790, 799 (1967). Obviously, annexations similarly cannot be presumed to be devoid of legitimate uses. Yet both of these practices are regularly prohibited by the Act in most covered cities.

Nor does the prohibition of all practices with a disparate impact enhance congressional prevention of purposeful discrimination. The changes in issue are not, like literacy tests, though fair on their face, subject to discriminatory application by local authorities. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). They are either discriminatory from the outset or not.

Finally, the advantages supporting the imposition of a nationwide ban are simply not implicated in this case. No added administrative burdens are in issue since Congress has provided the mechanism for preclearance suits in any event, and the burden of proof for this issue is on the locality. And it is certain that the only constitutional wrong implicated—purposeful dilution—can be effectively remedied by prohibiting it where it occurs. For all these reasons, I do not think

that the present case is controlled by the result in *Oregon*. By prohibiting all electoral changes with a disparate impact, Congress has attempted to prevent disparate impacts—not purposeful discrimination.

Congress unquestionably has the power to prohibit and remedy state action which intentionally deprives citizens of Fourteenth and Fifteenth Amendment rights. But unless these powers are to be wholly uncanalized, it cannot be appropriate remedial legislation for Congress to prohibit Rome from structuring its government in the manner as its population sees fit absent a finding or unrebutted presumption that Rome has been, or is, intentionally discriminating against its black citizens. Rome has simply committed no constitutional violations, as this Court has defined them.

More is at stake than sophistry at its worst in the Court's conclusion that requiring the local government to structure its political system in a manner that most effectively enhances black political strength serves to remedy or prevent constitutional wrongs on the part of the local government. The need to prevent this disparate impact is premised on the assumption that white candidates will not represent black interests, and that States should devise a system encouraging blacks to vote in a bloc for black candidates. The findings in this case alone demonstrate the tenuous nature of these assumptions. The court below expressly found that white officials have ably represented the interests of the black community. Even blacks who testified admitted no dissatisfaction, but expressed only a preference to be represented by officials of their own race. The enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to "get even" for wrongs inflicted on their forebears. What is now at stake in the city of Rome is the preference of the black community to be represented by a black. This Court has never elevated such a notion, by no means confined to blacks, to the status of a constitutional right. See *Whitcomb* v. *Chavis*,

403 U. S. 124 (1971). This Court concluded in *Whitcomb* that

> "[t]he mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.*, at 154–155.

The Constitution imposes no obligation on local governments to erect institutional safeguards to ensure the election of a black candidate. Nor do I believe that Congress can do so, absent a finding that this obligation would be necessary to remedy constitutional violations on the part of the local government.

It is appropriate to add that even if this Court could find a remedial relationship between the prohibition of all state action with a disparate impact on black voting strength and the incidence of purposeful discrimination, this Court should exercise caution in approving the remedy in issue here absent purposeful dilution. Political theorists can readily differ on the advantages inherent in different governmental structures. As Mr. Justice Harlan noted in his dissent in *Fairley* v. *Patterson*, decided together with *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969): "[I]t is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system. Under one system, Negroes have some influence in the election of all officers; under the other, minority groups have more influence in the selection of fewer officers." *Id.*, at 586 (emphasis deleted).

B

The result reached by the Court today can be sustained only upon the theory that Congress was empowered to determine that structural changes with a disparate impact on a minority group's ability to elect a candidate of their race

violates the Fourteenth or Fifteenth Amendment. This construction of the Fourteenth Amendment was rejected in the *Civil Rights Cases*, 109 U. S. 3 (1883). The Court emphasized that the power conferred was "remedial" only. The Court reasoned that the structure of the Amendment made it clear that it did not "authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers . . . , when these are subversive of the fundamental rights specified in the [A]mendment." *Id.*, at 11. This interpretation is consonant with the legislative history surrounding the enactment of the Amendment.[7]

This construction has never been refuted by a majority of the Members of this Court. Support for this construction in current years has emerged in *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), and *Oregon* v. *Mitchell*, 400 U. S. 112 (1970).[8] See also opinion of POWELL, J., *ante*, at 200–201. In *South Carolina* v. *Katzenbach*, the Court observed that Congress could not attack evils not comprehended by the Fifteenth Amendment. 383 U. S., at 326. In *Oregon* v. *Mitchell*, five Members of the Court were unwilling to conclude that Congress had the power to determine that estab-

[7] See, *e. g.*, Burt, Miranda And Title II: A Morganatic Marriage, 1969 S. Ct. Rev. 81.

[8] Explicit support can also be derived from Mr. Justice Harlan's dissenting opinion, joined by MR. JUSTICE STEWART, in *Katzenbach* v. *Morgan*, 384 U. S. 641, 659 (1966). Mr. Justice Harlan clarified the need for the remedial construction of congressional powers. It is also unnecessary, however, to read the majority opinion as establishing the Court's rejection of the remedial construction of the *Civil Rights Cases*. While MR. JUSTICE BRENNAN's majority opinion did contain language suggesting a rejection of the "remedial" construction of the enforcement powers, the opinion also advanced a remedial rationale which supports the determination reached by the Court. Compare the rationales forwarded at 384 U. S., at 654 with the statements, *id.*, at 656. It would be particularly inappropriate to construe *Katzenbach* v. *Morgan* as a rejection of the remedial interpretation of congressional powers in view of this Court's subsequent decision in *Oregon* v. *Mitchell*.

lishing the age limitation for voting at 21 denied equal protection to those between the ages of 18 and 20.

The opinion of MR. JUSTICE STEWART in that case, joined by MR. CHIEF JUSTICE BURGER and MR. JUSTICE BLACKMUN, reaffirmed that Congress only has the power under the Fourteenth Amendment to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause" but not to "determine as a matter of substantive constitutional law what situations fall within the ambit of the clause." *Id.*, at 296. Mr. Justice Harlan, in a separate opinion, reiterated his belief that it is the duty of the Court, and not the Congress, to determine when States have exceeded constitutional limitations imposed upon their powers. *Id.*, at 204–207. Cf. *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958). Mr. Justice Black also was unwilling to accept the broad construction of enforcement powers formulated in the opinion of MR. JUSTICE BRENNAN, joined by JUSTICES WHITE and MARSHALL.[9]

The Court today fails to heed this prior precedent. To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.

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[9] Since Mr. Justice Black found that congressional powers were more circumscribed when not acting to counter racial discrimination under the Fourteenth Amendment, he did not have to determine the precise nature of congressional powers when they were exercised in the field of racial relations. His analysis of the nationwide ban on literacy tests, also presented in *Oregon* v. *Mitchell*, however, is consistent with a remedial interpretation of those powers.

BALDASAR *v.* ILLINOIS

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

No. 77-6219. Argued November 26, 1979—Decided April 22, 1980

Held: While an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated, such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. Thus, petitioner's uncounseled misdemeanor-theft conviction, even though it resulted only in a fine, cannot be used upon his later conviction for another misdemeanor theft to support a 1-to-3-year prison sentence under an Illinois statute authorizing such a sentence for a second misdemeanor-theft conviction.

52 Ill. App. 3d 305, 367 N. E. 2d 459, reversed and remanded.

Michael Mulder argued the cause for petitioner. With him on the briefs were *Mary Robinson, Ralph Ruebner,* and *Peter Nolte.*

Michael B. Weinstein, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, and *Donald B. Mackay* and *Melbourne A. Noel, Jr.,* Assistant Attorneys General.*

PER CURIAM.

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), the Court held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not incarcerated. This case presents the question whether such a conviction may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term.

Solicitor General McCree, Assistant Attorney General Heymann, and *Harriet S. Shapiro* filed a brief for the United States as *amicus curiae* urging affirmance.

Under Illinois law, theft "not from the person" of property worth less than $150 is a misdemeanor punishable by not more than a year of imprisonment and a fine of not more than $1,000. Ill. Rev. Stat., ch. 38, §§ 16–1 (e)(1), 1005–8–3 (a)(1), 1005–9–1 (a)(2) (1975). A second conviction for the same offense, however, may be treated as a felony with a prison term of one to three years. § 1005–8–1 (b)(5).

Thomas Baldasar, the petitioner, was convicted of misdemeanor theft in Cook County Circuit Court in May 1975. The record of that proceeding indicates that he was not represented by a lawyer and did not formally waive any right to counsel. Baldasar was fined $159 and sentenced to one year of probation. In November 1975 the State charged him with stealing a shower head worth $29 from a department store. The case was tried to a jury in Du Page County Circuit Court in August 1976. The prosecution introduced evidence of the prior conviction and asked that Baldasar be punished as a felon under the Illinois enhancement statute. Defense counsel objected to the admission of the 1975 conviction. She argued unsuccessfully that because Baldasar had not been represented by a lawyer at the first proceeding, the conviction was too unreliable to support enhancement of the second misdemeanor. App. 7–9. The jury returned a guilty verdict on the felony charge, and Baldasar was sentenced to prison for one to three years.

The Illinois Appellate Court affirmed by a divided vote. It emphasized that when the right to counsel in misdemeanor cases was recognized in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), this Court confined that right to prosecutions that "'end up in the actual deprivation of a person's liberty.'" 52 Ill. App. 3d 305, 307, 367 N. E. 2d 459, 462 (1977), quoting *Argersinger, supra*, at 40. The Illinois court rejected petitioner's argument that the Sixth and Fourteenth Amendments prevented the imposition of the enhanced prison term. "The fact is," the court wrote, "that [Baldasar] was sentenced to imprisonment for his second theft conviction only and not, as

he suggests, sentenced again, and this time to imprisonment, for the first theft conviction." 52 Ill. App. 3d, at 310, 367 N. E. 2d, at 463. The Supreme Court of Illinois denied leave to appeal, and we granted certiorari. 440 U. S. 956 (1979).

For the reasons stated in the concurring opinions, the judgment is reversed, and the case is remanded to the Appellate Court of Illinois, Second District, for further proceedings.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367, the Court held that "the Sixth and Fourteenth Amendments to the United States Constitution require . . . that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.*, at 373–374.

In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense.

It seems clear to me that this prison sentence violated the constitutional rule of *Scott* v. *Illinois*, *supra*, and I, therefore, join the opinion and judgment of the Court.*

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS join, concurring.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the As-

*It is noteworthy that the brief filed by the State of Illinois in *Scott* expressly anticipated the result in this case:

"When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, *he will be precluded from*

sistance of Counsel for his defence." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963), held that the appointment of counsel for an indigent criminal defendant is "fundamental and essential to a fair trial." Therefore, the guarantee of counsel was made applicable to the States through the Fourteenth Amendment. *Gideon*, of course, involved a felony prosecution, but nothing in the opinion suggests that its reasoning was not, like the words of the Sixth Amendment itself, applicable to "all criminal prosecutions." In *Argersinger* v. *Hamlin*, 407 U. S. 25, 37 (1972), we rejected the suggestion that the right to counsel applied only to nonpetty offenses where the accused had a right to a jury trial, and held that "no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."

Seven years later, in *Scott* v. *Illinois*, 440 U. S. 367 (1979), we considered a question expressly reserved in *Argersinger*, whether counsel must be provided if imprisonment was an authorized punishment but had not actually been imposed. See *Argersinger* v. *Hamlin*, *supra*, at 37. The Court "conclude[d] . . . that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings" and "adopt[ed] . . . actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott* v. *Illinois*, *supra*, at 373. For the reasons stated in MR. JUSTICE BRENNAN's dissenting opinion in *Scott*, I remain convinced that that case was wrongly decided. Nevertheless, even if one accepts the line drawn in *Scott* as the constitutional rule applicable to this case, I think it plain

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enhancing subsequent offenses. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion." Brief for Respondent in *Scott* v. *Illinois*, O. T. 1978, No. 77–1177, p. 20 (emphasis added).

MR. JUSTICE BRENNAN adheres to his dissent in *Scott* v. *Illinois*, 440 U. S. 367, 375.

that petitioner's prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.

The court below held that petitioner's earlier conviction for shoplifting three packages of bacon was constitutionally valid under *Scott* since he received only a fine and probation, and therefore it could be used to elevate his subsequent conviction from a misdemeanor to a felony and to permit him to be sentenced to three years in prison rather than the one year maximum otherwise applicable. This logic is fallacious for the simple reason that petitioner's prior conviction was not valid for all purposes. Specifically, under the rule of *Scott* and *Argersinger*, it was invalid for the purpose of depriving petitioner of his liberty.

Scott, of course, did not purport to modify or restrict *Argersinger*. The question in *Scott* was simply one of "the proper application of our decision" in *Argersinger*. *Scott* v. *Illinois*, *supra*, at 368. The Court concluded that the precise holding in *Argersinger*, that counsel was required because Argersinger had been imprisoned as a result of the prosecution, expressed the limit of the right to counsel. Accordingly, the Court declined to extend *Argersinger* to all cases in which imprisonment was an authorized penalty. In the Court's view, *Argersinger* rested primarily on the conclusion "that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense," 440 U. S., at 372–373.

That petitioner has been deprived of his liberty "as a result of [the first] criminal trial" could not be clearer. If it had not been for the prior conviction, petitioner could not have been sentenced to more than one year for the present offense.[1]

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[1] The fact that petitioner could be sentenced to *some* period of incarceration as a result of his second conviction does not, of course, prevent

Solely because of the previous conviction the second offense was transformed from a misdemeanor into a felony, with all the serious collateral consequences that a felony conviction entails, and he received a sentence that may result in imprisonment for two years in excess of that 1-year maximum.

MR. JUSTICE POWELL's dissenting opinion, *post*, at 232, asserts that this result is constitutionally permissible because under the enhancement statute the increased punishment was imposed for the second offense rather than the first. I agree that the increased prison sentence in this case is not an enlargement of the sentence for the original offense. If it were, this would be a double jeopardy case. But under the recidivist clause of the Illinois statute, if the State proves a prior conviction for the same offense a completely different range of sentencing options, including a substantially longer term of imprisonment, becomes available. The sentence petitioner actually received would not have been authorized by statute but for the previous conviction. It was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*.

We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has "the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932), his conviction is not sufficiently reliable to support the severe sanction of imprisonment. *Argersinger* v. *Hamlin*, *supra*, at 31–36.[2] An uncoun-

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him from objecting to a further deprivation of liberty on the basis of an uncounseled conviction.

[2] I cannot agree with MR. JUSTICE POWELL's unsupported assertion, *post*, at 233–234, n. 2, that an uncounseled misdemeanor conviction is more likely to be reliable than an uncounseled felony conviction. I had thought that suggestion was squarely rejected in *Argersinger*. Mr. Justice Douglas' opinion for the Court emphasized the need for the assistance of counsel to assure reliability of misdemeanor convictions: "We are by no means convinced that legal and constitutional questions involved in a case

seled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute. It is therefore incorrect to say that our decision today creates a "new hybrid" of misdemeanor convictions. *Post*, at 232 (POWELL, J., dissenting). To the contrary, a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term

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that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more." *Argersinger* v. *Hamlin*, 407 U. S., at 33. THE CHIEF JUSTICE concurred in the result, stating: "The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman. . . . There is little ground, therefore, to assume that a defendant, unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges." *Id.*, at 41. MR. JUSTICE POWELL observed: "Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap, will be incapable of defending themselves." *Id.*, at 47 (opinion concurring in result).

In fact, as the opinion for the Court recognized, misdemeanor convictions may actually be less reliable than felony convictions. "[T]he volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result. . . . 'The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush.' . . . There is evidence of the prejudice which results to misdemeanor defendants from this 'assembly-line justice.'" *Id.*, at 34–36 (footnote and citations omitted). Moreover, if the case is tried to a jury, as was petitioner's first conviction, it is entirely possible that jurors may be less scrupulous about applying the reasonable-doubt standard if the offense charged is "only a misdemeanor."

collaterally, would be an illogical and unworkable deviation from our previous cases.[3]

MR. JUSTICE BLACKMUN, concurring.

In *Scott* v. *Illinois*, 440 U. S. 367 (1979), I stated in dissent:

> "Accordingly, I would hold that an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense, that is, one punishable by more than six months' imprisonment, see *Duncan* v. *Louisiana*, 391 U. S. 145 (1968); *Baldwin* v. *New York*, 399 U. S. 66 (1970), *or* whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment, *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972).
>
> "This resolution, I feel, would provide the 'bright line'

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[3] The dissent expresses concern that our decision will impose unacceptable economic burdens on state and local governments. *Post*, at 235. I do not share that view. Not all misdemeanor defendants, of course, are indigent. See *Scott* v. *Illinois*, 440 U. S. 367, 385, and n. 16 (1979) (BRENNAN, J., dissenting). Where the defendant is indigent, counsel will be provided in the first trial unless the prosecution does not seek a jail term. A great many States provide counsel in all cases where imprisonment is authorized, even though counsel is not constitutionally required. See *id.*, at 386–387, n. 18. Further, not all subsequent offenses are subject to enhancement, and not all previous offenses are predicate offenses for enhancement purposes. Thus the number of cases in which the State must decide whether to provide counsel solely to preserve its ability to enhance a subsequent offense will be only a fraction of the total. In many of those remaining cases, the judgment whether future misconduct is likely, and whether the first offense is serious enough to warrant its use for enhancement, will be a relatively easy exercise of prosecutorial discretion.

The economic effect of our decision today will be miniscule compared to that of *Powell* v. *Alabama*, 287 U. S. 45 (1932), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Argersinger* v. *Hamlin*, *supra*. But whatever that cost may be, it cannot outweigh the Sixth Amendment command that no one may be imprisoned as a result of a conviction in which he was denied the assistance of counsel.

> that defendants, prosecutors, and trial and appellate courts all deserve and, at the same time, would reconcile on a principled basis the important considerations that led to the decisions in *Duncan*, *Baldwin*, and *Argersinger*." *Id.*, at 389–390.

I still am of the view that this "bright line" approach would best preserve constitutional values and do so with a measure of clarity for all concerned. Had the Court in *Scott* v. *Illinois* adopted that approach, the present litigation, in all probability, would not have reached us. Petitioner Baldasar was prosecuted for an offense punishable by more than six months' imprisonment, and, under my test, was entitled to counsel at the prior misdemeanor proceeding. Since he was not represented by an attorney, that conviction, in my view, is invalid and may not be used to support enhancement.

I therefore join the Court's *per curiam* opinion and its judgment.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join, dissenting.

Last Term in *Scott* v. *Illinois*, 440 U. S. 367 (1979), we rejected the claim that *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), requires the appointment of counsel for an indigent charged with a misdemeanor punishable by imprisonment, regardless of whether the defendant actually is sentenced to jail. We held explicitly that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not jailed.

In 1975, the petitioner in this case was tried without the appointment of counsel and convicted of a misdemeanor theft. Although the statute authorized imprisonment, petitioner only was fined. The circumstances of that conviction, therefore, were precisely like those of the petitioner in *Scott* v. *Illinois*, and the conviction was constitutionally valid.

The question presented today is different from that decided

in *Scott*. This case concerns the enhanced sentence imposed on petitioner Baldasar for a subsequent conviction for misdemeanor theft. Petitioner, who was represented by counsel at the second trial, concedes that he could have been sentenced to one year in jail for the second offense. He challenges only the addition of two years to his sentence, an enhancement that was based on his record as a recidivist. The Court holds that, even though the first conviction was valid, the State cannot rely upon it for enhancement purposes following a subsequent valid conviction. This holding undermines the rationale of *Scott* and *Argersinger* and leaves no coherent rationale in its place. A constitutionally valid conviction is now constitutionally invalid if relied upon as the predicate for enhancing the sentence of a recidivist.

In my view, this result is logically indefensible. More seriously, the courts that try misdemeanor cases daily no longer have clear guidance from this Court. No court can predict with confidence whether a misdemeanor defendant is likely to become a recidivist. The option of not imposing a jail sentence on an uncounseled misdemeanant, expressly preserved by *Argersinger* and *Scott*, no longer exists unless the court is willing prospectively to preclude enhancement of future convictions. I dissent both because I believe that *Scott* dictates a contrary result, and because the courts of our Nation are entitled, at a minimum, to a clear rule on this important question.

I

Scott held that "actual imprisonment [is] the line defining the constitutional right to appointment of counsel." 440 U. S., at 373. Petitioner Baldasar concedes the validity under *Scott* of his uncounseled theft conviction in 1975. He argues, nevertheless, that the enhanced sentence imposed for the second offense included an element of imprisonment for the first conviction. Consequently, he continues, the enhancement violates the rule of *Scott* that a conviction may not lead

to imprisonment unless retained or appointed counsel is available to the defendant. Although MR. JUSTICE BLACKMUN applies his own "bright line" approach to the question, four Members of the Court agree with petitioner's contentions. See *ante*, p. 224 (STEWART, J., concurring); *ante*, p. 224 (MARSHALL, J., concurring).

This line of argument misapprehends the nature of enhancement statutes. These laws, commonplace in our criminal justice system, do not alter or enlarge a prior sentence. If, as in this case, a person with a prior conviction chooses to commit a subsequent crime, he *thereby* becomes subject to the increased penalty prescribed for the second crime. This Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant. *E. g.*, *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962). Under Illinois law a second conviction for petty theft may be treated as a felony with a prison term. The sentence imposed upon petitioner was solely a penalty for the second theft.

Moreover, petitioner's argument ignores the significance of the constitutional validity of his first conviction. Petitioner questions neither the factual accuracy nor the legality of that conviction. In order to accept his argument, the Court creates a special class of uncounseled misdemeanor convictions. Those judgments are valid for the purposes of their own penalties as long as the defendant receives no prison term. But the Court holds that these convictions are invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction.

By creating this new hybrid, the Court departs from the position it took after *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), established the right to counsel in felony cases. Following *Gideon*, the Court consistently held that because an uncounseled felony conviction was constitutionally invalid—and therefore void—it could not be put to other uses in court. In *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967), the

Court stated that an uncounseled felony conviction could not be used in a later trial to enhance punishment under a recidivist statute. *Loper* v. *Beto*, 405 U. S. 473, 483 (1972), barred impeachment of a defendant with such a felony conviction, and *United States* v. *Tucker*, 404 U. S. 443 (1972), held that a sentencing judge cannot consider a prior uncounseled felony.

Misdemeanor convictions, however, have been treated differently. *Argersinger* held that in misdemeanor cases the right to counsel applies only if the prosecution may "end up in the actual deprivation of a person's liberty." 407 U. S., at 40. In a fully considered opinion last Term, the Court ruled in *Scott* that the Sixth Amendment does not bar an uncounseled misdemeanor conviction if the defendant is not imprisoned.[1]

Logically, just as a constitutionally *invalid* felony judgment could not be used for sentence enhancement in *Burgett*, the *valid* misdemeanor conviction in this case should be available to enhance petitioner's sentence. But the Court makes no effort to defend its ruling on the basis of logic, or even on the policy ground that an uncounseled misdemeanor conviction is too unreliable to support enhancement of a subsequent sentence.[2] Instead, four Members of the Court rely on what

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[1] Despite reservations, I joined the decision in *Scott* v. *Illinois* because it was consistent with *Argersinger* v. *Hamlin*, 407 U. S., at 44 (POWELL, J., concurring in result), and it "provide[d] clear guidance to the hundreds of courts across the country that confront this problem daily." 440 U. S., at 374 (POWELL, J., concurring).

[2] Although only the opinion of MR. JUSTICE MARSHALL mentions the issue, *ante*, at 227–228, n. 2, petitioner urges that an uncounseled misdemeanor conviction is too unreliable to support sentence enhancement for later offenses. Compared to a felony judgment, however, most uncounseled misdemeanor convictions are far more likely to be reliable. In my separate opinion in *Argersinger*, I expressed the view that counsel should be provided in certain misdemeanor cases *not* involving the possibility of a jail sentence. 407 U. S., at 47–50. That view was rejected by the Court. It cannot be denied, however, that the issues in the great majority of misdemeanor cases are not complicated and the facts often are

I view as the incorrect statement that sentence enhancement equals imprisonment for the earlier offense, while a fifth Member adheres to the assertion rejected in *Scott* that a "bright line" should require counsel for prosecutions that could result in imprisonment for six months or more. *Ante*, p. 229 (BLACKMUN, J., concurring).[3]

II

The Court's decision not only is analytically unsound, but also will create confusion in local courts and impose greater burdens on state and local governments. The Illinois Appellate Court pointed out that at least 11 Illinois laws, including the statute at issue here, impose enhanced penalties for repeat misdemeanants. 52 Ill. App. 3d 305, 308, and n. 1, 367 N. E. 2d 459, 462, and n. 1 (1977). Most state criminal codes have similar provisions. See, *e. g.*, Note, 35 Ohio St. L. J. 168, 182, n. 72 (1974) (citing Ohio statutes). And the Solicitor General, urging affirmance in this case, emphasized that this deci-

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not in dispute. In addition, most such cases are tried to a judge. But there is a more fundamental answer to petitioner's argument. Here, the uncounseled conviction is conceded to be valid and thus must be presumed reliable.

[3] Today's decision is all the more puzzling in view of the Court's recent ruling in *Lewis* v. *United States*, 445 U. S. 55 (1980). *Lewis* held that an uncounseled *felony* conviction is a proper predicate for imposing federal sanctions for possession of a firearm by a felon. Although I dissented on statutory grounds in *Lewis*, the opinion's constitutional holding squarely conflicts with today's decision. Unlike misdemeanors, all uncounseled felony judgments are constitutionally invalid. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Yet *Lewis* held that even though the federal firearm statute imposes a prison sentence solely because the defendant had an uncounseled—and thus void—felony conviction on his record, that procedure does not use the void conviction to "'support guilt or enhance punishment.'" 445 U. S., at 67, quoting *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). In this case, the Court refuses to permit sentence enhancement on the basis of a constitutionally valid misdemeanor conviction. The conflict between the two holdings could scarcely be more violent.

sion will hamper enforcement of important federal statutes long in effect.[4] Providing counsel for all defendants charged with enhanceable misdemeanors will exacerbate the delays that plague many state misdemeanor courts and will impose unnecessary costs on local governments. Those communities that cannot provide counsel for misdemeanor defendants will lose by default the possibility of enhancing future sentences if criminal conduct persists. The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties.

In addition, as the Illinois Appellate Court predicted, today's ruling will incite further litigation claiming that uncounseled misdemeanor convictions cannot be used to impeach a defendant's testimony, or that judges should not consider such convictions in later sentencing determinations. 52 Ill. App. 3d, at 310, 367 N. E. 2d, at 463. Following today's pronouncement, there is no way to predict the outcome of any such claim.

But at least it is clear, regrettably, that the Court has frustrated its own effort in *Scott* to provide effective guidance to the local courts that try misdemeanor cases every day. I would affirm the decision of the Illinois Appellate Court that faithfully followed our decision in *Scott*.

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[4] Brief for United States as *Amicus Curiae* 2, citing 8 U. S. C. § 1325 (illegal entry into United States by alien); and 2, n. 2, citing 15 U. S. C. § 1263 (shipment of misbranded or banned hazardous substances).

WILLIAMS ET AL. *v.* BROWN ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-357. Argued March 19, 1979—Reargued October 29, 1979—Decided April 22, 1980

575 F. 2d 298, vacated and remanded.

William H. Allen reargued the cause for appellants. With him on the briefs were *Donald Harrison, John Michael Clear,* and *Robert C. Campbell III.*

Eric Schnapper reargued the cause for appellees. With him on the briefs were *J. U. Blacksher, Larry Menefee,* and *Jack Greenberg.*

Deputy Assistant Attorney General Turner reargued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree, Assistant Attorney General Days, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Brian K. Landsberg, Jessica Dunsay Silver, Dennis J. Dimsey,* and *Miriam R. Eisenstein.*

PER CURIAM.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings in light of the decision of the Court announced today in *City of Mobile* v. *Bolden, ante,* p. 55.

It is so ordered.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante,* p. 94.]

[For dissenting opinion of MR. JUSTICE MARSHALL, see *ante,* p. 103.]

MR. JUSTICE BLACKMUN, concurring.

I, of course, must accept the Court's vacation of the judgment and its remand. If, however, we were to reach the

merits, then, in contrast to the result in *City of Mobile* v. *Bolden, ante,* p. 55, I would affirm the judgment of the Court of Appeals in this case.

MR. JUSTICE WHITE, dissenting.

Because the decision below in this case is based on findings of fact and conclusions of law virtually identical to those in *City of Mobile* v. *Bolden, ante,* p. 55, I dissent for the reasons stated in my opinion in that case, *ante,* p. 94.

MARSHALL, SECRETARY OF LABOR, ET AL. *v.* JERRICO, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 79-253. Argued March 19, 1980—Decided April 28, 1980

Under § 16 (e) of the Fair Labor Standards Act (Act), sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. An Assistant Regional Administrator determined that violations of child labor provisions of the Act had occurred at restaurants managed by appellee and assessed a fine against appellee, including an amount for willful violation. After appellee filed exceptions to the Assistant Regional Administrator's determination and assessment, a hearing was held before an Administrative Law Judge, who accepted the Assistant Regional Administrator's contention that violations had occurred, but found that the violations were not willful and reduced the total assessment accordingly. Appellee then filed suit in Federal District Court, contending that § 16 (e) violated the Due Process Clause of the Fifth Amendment. The District Court granted summary judgment for appellee, holding that the reimbursement provision of § 16 (e) created an impermissible risk of bias on the part of the Assistant Regional Administrator because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, and thus § 16 (e) could distort the Assistant Regional Administrator's objectivity in assessing penalties.

Held: The reimbursement provision of § 16 (e) does not violate the Due Process Clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration. Pp. 242-252.

(a) Strict due process requirements as to the neutrality of officials performing judicial or quasi-judicial functions, cf. *Tumey* v. *Ohio*, 273 U. S. 510; *Ward* v. *Monroeville*, 409 U. S. 57, are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. In an adversary system, prosecutors are permitted to be zealous in their

enforcement of the law. Although traditions of prosecutorial discretion do not immunize from judicial scrutiny enforcement decisions that are contrary to law, rigid standards of neutrality cannot be the same for administrative prosecutors as for judges. Pp. 242–250.

(b) It is unnecessary in this case to determine with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of child labor provisions; there is no realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts; and ESA's administration of the Act has minimized any potential for bias. On this record, the possibility that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plaintiff-like functions. Pp. 250–252.

Reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Geller argued the cause for appellants. With him on the briefs was *Solicitor General McCree.*

Thomas W. Power argued the cause for appellee. With him on the brief were *William E. Anderson* and *Curtis L. Wilson.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Under § 16 (e) of the Fair Labor Standards Act, 29 U. S. C. § 216 (e), sums collected as civil penalties for the unlawful employment of child labor are returned to the Employment Standards Administration (ESA) of the Department of Labor in reimbursement for the costs of determining violations and assessing penalties. The question for decision is whether this provision violates the Due Process Clause of the Fifth Amendment by creating an impermissible risk of bias in the Act's enforcement and administration.

I

The child labor provisions of federal law are primarily contained in § 12 of the Fair Labor Standards Act, 52 Stat. 1067, as amended, 29 U. S. C. § 212. The Secretary of Labor has designated the ESA as the agency responsible for enforcing these provisions, 36 Fed. Reg. 8755 (1971). The ESA in turn carries out its responsibilities through regional offices, and the assistant regional administrator of each office has been charged with the duty of determining violations and assessing penalties.

Appellee Jerrico, Inc., is a Delaware corporation that manages approximately 40 restaurants in Kentucky, Indiana, Tennessee, Georgia, and Florida. In a series of investigations from 1969 to 1975, the ESA uncovered over 150 violations of the child labor provisions at appellee's various establishments. After considering the factors designated by statute and regulations,[1] the ESA Assistant Regional Administrator in the Atlanta office assessed a total fine of $103,000 in civil penalties for the various violations. That figure included a supplemental assessment of $84,500 because of his conclusion that the violations were willful.

Appellee filed exceptions to the determination and assessment of the Assistant Regional Administrator, and pursuant to 29 U. S. C. § 216 (e), a hearing was held before an Administrative Law Judge. Witnesses included employees of appellee and representatives of the Department of Labor. The Administrative Law Judge accepted the Assistant Regional Adminis-

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[1] Those factors include "any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; the number of minors illegally employed; the age of the minors so employed and records of the required proof of age; the occupations in which the minors were so employed; exposure of such minors to hazards and any resultant injury to such minors; the duration of such illegal employment; and, as appropriate, the hours of the day in which it occurred and whether such employment was during or outside school hours." 29 CFR § 579.5 (c) (1979).

trator's contention that violations had occurred, concluding that the record showed "a course of violations" for which "[r]espondent's responsibility cannot be disputed." At the same time, he was persuaded by appellee's witnesses and by a review of the evidence that the violations were not willful. Accordingly, he reduced the total assessment to $18,500.

Appellee did not seek judicial review of the decision of the Administrative Law Judge. Instead, it brought suit in Federal District Court, challenging the civil penalty provisions of the Act on constitutional grounds and seeking declaratory and injunctive relief against their continued enforcement. Appellee accepted the determination of the Administrative Law Judge and alleged no unfairness in the proceedings before him. Nonetheless, it contended that § 16 (e) of the Act violated the Due Process Clause of the Fifth Amendment by providing that civil penalties must be returned to the ESA as reimbursement for enforcement expenses and by allowing the ESA to allocate such fines to its various regional offices. According to appellee, this provision created an impermissible risk and appearance of bias by encouraging the assistant regional administrator to make unduly numerous and large assessments of civil penalties.

After the parties engaged in discovery with respect to the administration of § 16 (e), appellee moved for summary judgment. The District Court granted the motion. It acknowledged that the Office of Administrative Law Judges was unaffected by the total amount of the civil penalties. At the same time, the court concluded that the reimbursement provision created an impermissible risk of bias on the part of the assistant regional administrator. Citing *Tumey* v. *Ohio*, 273 U. S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), the court found that because a regional office's greater effort in uncovering violations could lead to an increased amount of penalties and a greater share of reimbursements for that office, § 16 (e) could distort the assistant regional administrator's objectivity in assessing penal-

ties for violations of the child labor provisions of the Act.

We noted probable jurisdiction, 444 U. S. 949 (1979), and now reverse.

II

A

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. See *Carey* v. *Piphus*, 435 U. S. 247, 259–262, 266–267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews* v. *Eldridge*, 424 U. S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

The requirement of neutrality has been jealously guarded by this Court. In *Tumey* v. *Ohio*, *supra*, the Court reversed convictions rendered by the mayor of a town when the mayor's salary was paid in part by fees and costs levied by him acting in a judicial capacity. The Court stated that the Due Process Clause would not permit any "procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused." 273 U. S., at 532. *Tumey* was applied in *Ward* v. *Village of Monroeville*, *supra*,

to invalidate a procedure by which sums produced from a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor's salary was not augmented by those sums. The forbidden "possible temptation," we concluded, is also present "when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." 409 U. S., at 60. We have employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure.[2] Indeed, "justice must satisfy the appearance of justice," *Offutt* v. *United States*, 348 U. S. 11, 14 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," *In re Murchison*, 349 U. S. 133, 136 (1955). See also *Taylor* v. *Hayes*, 418 U. S. 488 (1974).

Appellee contends that these principles compel the conclusion that the reimbursement provision of the Act violates the Due Process Clause. We conclude, however, that the strict requirements of *Tumey* and *Ward* are not applicable to the determinations of the assistant regional administrator, whose functions resemble those of a prosecutor more closely than those of a judge. The biasing influence that appellee discerns in § 16 (e) is, we believe, too remote and insubstantial to violate the constitutional constraints applicable to the deci-

[2] For example, we have invalidated a system in which justices of the peace were paid for issuance but not for nonissuance of search warrants, *Connally* v. *Georgia*, 429 U. S. 245 (1977) (*per curiam*); prohibited the trial of a defendant before a judge who has previously held the defendant in contempt, *Taylor* v. *Hayes*, 418 U. S. 488 (1974); *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971); forbidden a state administrative board consisting of optometrists in private practice from hearing charges filed against licensed optometrists competing with board members, *Gibson* v. *Berryhill*, 411 U. S. 564, 578–579 (1973); and prohibited a parole officer from making the determination whether reasonable grounds exist for the revocation of parole, *Morrissey* v. *Brewer*, 408 U. S. 471, 485–486 (1972).

sions of an administrator performing prosecutorial functions. To explain our conclusion, we turn to the relevant sections of the Act.

As noted above, the major portions of the federal child labor provisions appear in 29 U. S. C. § 212, which outlaws the employment in interstate commerce of "oppressive child labor," as that term is defined in 29 U. S. C. § 203 (*l*) and implementing regulations. These provisions demonstrate a firm federal policy of "protect[ing] the safety, health, well-being, and opportunities for schooling of youthful workers." 29 CFR § 570.101 (1979). See also H. R. Rep. No. 1452, 75th Cong., 1st Sess., 6 (1937); S. Rep. No. 884, 75th Cong., 1st Sess., 2, 6 (1937).

Before 1974, the Secretary of Labor enforced the child labor provisions primarily through actions for injunctive relief, see 29 U. S. C. §§ 212 (b), 217, and for criminal sanctions, see 29 U. S. C. §§ 216 (a), 215 (a)(4). Having found such relief to be an inadequate or insufficiently flexible remedy for violations of the law, cf. H. R. Rep. No. 93–913, p. 15 (1974), Congress in 1974 authorized the Secretary to assess a civil penalty not to exceed $1,000 for each violation of § 212. 29 U. S. C. § 216 (e). Under this provision for the assessment of civil penalties, the Secretary's determination of the existence of a violation and of the amount of the penalty is not final if the person charged with a violation enters an exception within 15 days of receiving notice. In the event that such an exception is entered, the final determination is made in an administrative hearing conducted in accordance with the Administrative Procedure Act, 5 U. S. C. § 554. The administrative law judge "may affirm, in whole or in part, the determination by the Administrator of the occurrence of violations or . . . may find that no violations occurred, and shall order payment of a penalty in the amount originally assessed or in a lesser amount . . . or order that respondent pay no penalty, as appropriate." 29 CFR § 580.32 (a) (1979). He is directed to consider the same factors considered by the assistant re-

gional administrator[3] in making his original assessment. *Ibid.* Under the natural construction of this regulation, the administrative law judge is required to conduct a *de novo* review of all factual and legal issues.[4]

The provision whose constitutionality is at issue in this case is a part of 29 U. S. C. § 216 (e), the civil penalty section of the Act. That provision states that civil penalties collected for violations of the child labor law "shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 9a of this title." Section 9a, 29 U. S. C. § 9a, added in 1934, provides in turn that all sums

> "received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States." [5]

The record developed in the District Court permits a detailed description of the administration of the reimbursement provision in the years 1976, 1977, and 1978. It is plain that no official's salary is affected by the levels of the penalties. In all three years the sums collected as child labor penalties amounted to substantially less than 1% of the ESA's budget.[6]

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[3] See n. 1, *supra*.

[4] See n. 9, *infra*, and accompanying text.

[5] The section was originally designed "[t]o authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes." See 48 Stat. 582; S. Rep. No. 322, 73d Cong., 2d Sess. (1934).

[6] In 1976, the ESA collected about $151,000 in child labor penalties; in 1977, $650,000; and in 1978, $592,000. By comparison, $87,407,000 was

And in each of those years, the ESA did not spend the full amount appropriated to it, and the sums that were not spent were returned to the Treasury. The amounts returned to the Treasury in that fashion substantially exceeded the sums collected under § 16 (e) in all three years.[7] The challenged provisions have not, therefore, resulted in any increase in the funds available to the ESA over the amount appropriated by Congress.

Civil penalties for child labor violations are allocated by the national office of the ESA, subject to the approval of the Secretary of Labor. In 1976, the sums collected were allocated to and retained by the ESA national office; in 1977, they were allocated to the national office, to the Office of the Solicitor of Labor, and to the various regional offices in proportion to the amounts expended on enforcement of the child labor provisions;[8] and in 1978, the penalties were held in the Treasury. Civil penalties have never been allotted to the regional offices on the basis of the total amount of penalties collected by particular offices.

The District Court concluded that in these circumstances the challenged provision violated the Due Process Clause under the principles set forth in *Tumey* and *Ward*. It noted that, as the 1977 practice demonstrated, the ESA has discretion to return sums collected as civil penalties to the regional offices in proportion to the amounts expended on enforcement efforts. Increased enforcement costs could thus lead to a

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appropriated to the ESA in 1976; $98,992,000 in 1977; and $119,632,000 in 1978. See Budget of the United States Government, Fiscal Year 1980—Appendix 652; Budget of the United States Government, Fiscal Year 1979—Appendix 623–624; Budget of the United States Government, Fiscal Year 1978—Appendix 510.

[7] The record indicates that, in 1976, the ESA returned $981,000 to the Treasury; $870,000 was returned in 1977; and $4,600,000 in 1978.

[8] In that year a total of $559,800 was allotted, including $194,800 to the national office. The Chicago office received $44,300, the highest allotment of any regional office; the Denver office received the lowest, $4,900.

larger share of reimbursements. According to the court, an assistant regional administrator would therefore be inclined to maximize the total expenditures on enforcement of the child labor provisions of the Act, and those increased expenditures would result in an increase in the number and amount of penalties assessed. The court concluded that this possibility created an unconstitutional risk of bias in the assistant regional administrator's enforcement decisions. We disagree.

The assistant regional administrator simply cannot be equated with the kind of decisionmakers to which the principles of *Tumey* and *Ward* have been held applicable. He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff. If the employer excepts to a penalty—as he has a statutory right to do—he is entitled to a *de novo* hearing before an administrative law judge.[9] In that hearing the assistant regional administrator acts as the complaining party and bears the burden of proof on contested issues. 29 CFR § 580.21 (a) (1979). Indeed,

[9] Appellee claims that the hearing before the administrative law judge is not truly *de novo* because the judge has the authority only to determine the existence of the violation, not to assess the reasonableness of the penalty. We are unable to discern any such limitation on the administrative law judge's authority. Under federal regulations, the administrative law judge is expressly empowered to review the amount of the penalty and is required to consider precisely those factors considered by the assistant regional administrator in making his assessment. See 29 CFR § 579.5 (1979). Indeed, in this very case the Administrative Law Judge carefully reviewed the Assistant Regional Administrator's assessment and reduced it by over 80%.

Appellee correctly points out that in *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972), we held that the availability of a trial *de novo* before an unbiased judge did not remove the constitutional infirmity in an original trial before one whose impartiality was impaired. A litigant, we said, "is entitled to a neutral and detached judge in the first instance." *Id.*, at 61–62. *Ward* does not aid appellee in this case, however, for the administrative law judge presides over the initial adjudication.

the Secretary's regulations state that the notice of penalty assessment and the employer's exception "shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding." 29 CFR § 580.3 (b) (1979). It is the administrative law judge, not the assistant regional administrator, who performs the function of adjudicating child labor violations. As the District Court found, the reimbursement provision of § 16 (e) is inapplicable to the Office of Administrative Law Judges.[10]

The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, see *Linda R. S.* v. *Richard D.*, 410 U. S. 614 (1973), and similar considerations have been found applicable to administrative prosecutors as well, see *Moog Industries, Inc.* v. *FTC*, 355 U. S. 411, 414 (1958); *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967). Prosecutors need not be entirely "neutral and detached," cf. *Ward* v. *Village of Monroeville*, 409 U. S., at 62. In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for

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[10] Appellee errs in suggesting that the Office of Administrative Law Judges is also entitled to reimbursement under § 16 (e). When read in conjunction with 29 U. S. C. § 9 (a), that section allows reimbursement to offices that "supervised [the] work" of "determining the violations and assessing and collecting [the] penalties." The Office of Administrative Law Judges does not "supervise" that work. Indeed, the Administrative Procedure Act expressly forbids such supervision. 5 U. S. C. § 554 (d). The Office of Administrative Law Judges maintains an administrative section within the Department of Labor entirely separate from that of the supervising body, the ESA, and the Office has a separate budget.

securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in *Tumey*, 273 U. S., at 535, where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the State and the people." See also *Hortonville School Dist.* v. *Hortonville Ed. Assn.*, 426 U. S. 482, 495 (1976).

We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See *Dunlop* v. *Bachowski*, 421 U. S. 560, 567, n. 7, 568–574 (1975); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).[11] Moreover, the decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication. Cf. 2 K. Davis, Administrative Law Treatise 215–256 (2d ed. 1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some

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[11] Cf., *e. g.*, *Adams* v. *Richardson*, 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973); *Environmental Defense Fund, Inc.* v. *Ruckelshaus*, 142 U. S. App. D. C. 74, 439 F. 2d 584 (1971); *Medical Comm. for Human Rights* v. *SEC*, 139 U. S. App. D. C. 226, 432 F. 2d 659 (1970), vacated as moot, 404 U. S. 403 (1972); *Perez* v. *Boston Housing Authority*, 379 Mass. 703, ———, ———, 400 N. E. 2d 1231, 1247, 1252–1253 (1980). See Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1752–1756 (1975); Jaffe, The Individual Right to Initiate Administrative Process, 25 Iowa L. Rev. 485 (1940).

contexts raise serious constitutional questions. See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 365 (1978); cf. 28 U. S. C. § 528 (1976 ed., Supp. III) (disqualifying federal prosecutor from participating in litigation in which he has a personal interest). But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.

B

In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function,[12] for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act. The salary of the assistant regional administrator is fixed by law. 5 U. S. C. § 5332 (1976 ed. and Supp. III). The pressures relied on in such cases as *Tumey* v. *Ohio*, *supra*; *Gibson* v. *Berryhill*, 411 U. S. 564, 579 (1973); and *Connally* v. *Georgia*, 429 U. S. 245, 250 (1977) (*per curiam*), are entirely absent here.

Nor is there a realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement efforts. As we have noted, the civil penalties collected under § 16 (e) represent substantially less than 1% of the budget of the ESA.[13] In each of the relevant years, the amount of the ESA's

[12] In particular, we need not say whether different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process.

[13] Even if the ESA received a considerable amount in civil penalties in a particular year, of course, it is possible that Congress would decide to appropriate a correspondingly lower amount from the Treasury.

budget that was returned to the Treasury was substantially greater than the amount collected as civil penalties. Unlike in *Ward* and *Tumey*, it is plain that the enforcing agent is in no sense financially dependent on the maintenance of a high level of penalties. Furthermore, since it is the national office of the ESA, and not any assistant regional administrator, that decides how to allocate civil penalties, such administrators have no assurance that the penalties they assess will be returned to their offices at all. See *Dugan* v. *Ohio*, 277 U. S. 61 (1928).

Moreover, the ESA's administration of the Act has minimized any potential for bias. In the only year in which the ESA elected to allocate part of the civil penalties to the regional offices, it did so in proportion to the expenses incurred in investigating and prosecuting child labor violations, not on the basis of the amounts of penalties collected. Thus, even if an assistant regional administrator were to act on the assumption that civil penalties would be returned to his office in any given year, his decision to assess an unjustifiably large penalty in a particular case would be of no benefit to his office, since that decision would not produce an increase in the level of expenses.

The District Court's conclusion that the reimbursement provision violated the Due Process Clause was evidently premised on its perception that an assistant regional administrator might be tempted to devote an unusually large quantity of resources to enforcement efforts in the hope that he would ultimately obtain a higher total allocation of federal funds to his office. This increase in enforcement effort, the court suggested, might incline the assistant regional administrator to assess an unjustified number of penalties, and to make those penalties unduly high. But in light of the factors discussed above, it is clear that this possibility is too remote to violate the constraints applicable to the financial or personal interest of officials charged with prosecutorial or plain-

tiff-like functions.[14] In order to produce the predicted result, the ESA would be required to decide to allocate civil penalties to regional offices; the sums allocated to the particular regional office would have to exceed any amount of that office's budget returned to the Treasury at the end of the fiscal year; the assistant regional administrator would have to receive authorization from his superiors to expend additional funds to increase his enforcement expenditures to the desired level; the increased expenditures would have to result in an increase in penalties; and the administrative law judge and reviewing courts would have to accept or ratify the assistant regional administrator's assessments. "[U]nder a realistic appraisal of psychological tendencies and human weakness," *Withrow* v. *Larkin*, 421 U. S. 35, 47 (1975), it is exceedingly improbable that the assistant regional administrator's enforcement decisions would be distorted by some expectation that all of these contingencies would simultaneously come to fruition. We are thus unable to accept appellee's contention that, on this record and as presently administered, the reimbursement provision violates standards of procedural fairness embodied in the Due Process Clause.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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[14] We need not, of course, say whether the alleged biasing influence is too remote to raise constitutional objections even under the standards of *Ward* and *Tumey*.

Syllabus

UNITED STATES v. LOUISIANA ET AL.

ON EXCEPTIONS TO SUPPLEMENTAL REPORT OF SPECIAL MASTER

No. 9, Orig. Argued March 18, 1980—Decided April 28, 1980

Held:

1. As the Special Master recommended, the United States is not obligated to account for and pay Louisiana either the value of the use of Louisiana's share of impounded funds that have been awarded and paid to the State under mineral leases on lands off its Gulf Coast, or interest upon that portion of those funds. The Interim Agreement that the parties entered into in response to this Court's ruling enjoining them from leasing wells in the disputed tidelands area except by agreement provided only that the payments made to the United States on each lease within the disputed area were to be impounded "in a separate fund in the Treasury of the United States" and, upon determination of the ownership of the lands, were to be taken from that fund and paid to the party entitled to them. The agreement contains no provision for the payment of interest or for the use of the funds or for investment, and there is nothing in the agreement's use of the word "impound," or in Louisiana's characterization of the arrangement as an escrow, to imply an obligation on the United States' part to pay interest or to pay for the use of the money. The impoundment of the funds having served its intended purpose, and all payments due Louisiana from the impounded funds having been made, the United States has fulfilled the obligations imposed upon it by the agreement. Pp. 261–266.

2. Contrary to the Special Master's recommendations, Louisiana is obligated to account to the United States for revenues derived by the State from mineral leases on areas within the zone contiguous to the coastline (Zone 1) adjudicated to the United States. The provision of the Outer Continental Shelf Lands Act authorizing the United States to make an agreement with a State as to existing mineral leases and the issuance of new leases "pending the settlement or adjudication" of a controversy as to ultimate ownership, and stating that payments made pursuant to such an agreement shall be considered as compliance with certain lease validation requirements of the Act, does not govern payments made by Louisiana's lessees in Zone 1 so as to foreclose any federal claim with respect to those payments. The provision means no more than that a lessee is not in default so long as the agreement remains in effect and he makes the required payments, and there is no

basis for reading into the provision a waiver by the United States of Louisiana's independent duty to account, or a waiver of any claim for money due the United States. The State's obligation does not derive from the Act, but was imposed by this Court's 1950 decree specifying that the United States was entitled to an accounting from Louisiana of all sums received by the State from lands adjudicated to the United States, was not waived by the Interim Agreement, and is not excused by the above provision of the Outer Continental Shelf Lands Act. Pp. 266–272.

3. The Court accepts, upon acquiescence of the parties, the Special Master's recommendations that Louisiana has no obligation to account for and pay to the United States money collected by the State as severance taxes on minerals removed from areas adjudicated to the United States. P. 272.

Exceptions to Special Master's supplemental report overruled in part and sustained in part, and case remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and STEVENS, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, in which STEWART and REHNQUIST, JJ., joined, *post*, p. 273. MARSHALL, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Bruce C. Rashkow, Michael W. Reed,* and *Margaret Strand.*

William J. Guste, Jr., Attorney General of Louisiana, and *Frederick W. Ellis,* Special Assistant Attorney General, argued the cause for defendants. With them on the briefs were *Oliver P. Stockwell* and *Booth Kellough,* Special Assistant Attorneys General, *Gary L. Keyser* and *C. H. Mandell,* Assistant Attorneys General, and *Nora K. Duncan.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

We are concerned here with certain features of what appears to be the final stage of the long-continuing and sometimes strained controversy between the United States and the State of Louisiana over the proceeds of mineral leases on lands off

Louisiana's Gulf Coast. Specifically at issue are the asserted obligation of the United States for interest on, or for the value of the use of, impounded funds that have been awarded and paid to Louisiana, and the asserted obligation of Louisiana to account to the United States for certain unimpounded lease revenues received by the State.

I

Litigation between the United States and the State of Louisiana over rights in lands submerged in the Gulf of Mexico off the Louisiana coast began over 30 years ago, in 1948, when the United States moved this Court, under its original jurisdiction, for leave to file a complaint. The Government prayed for a decree (a) declaring rights of the United States as against Louisiana over lands "underlying the Gulf of Mexico, lying seaward of the ordinary low-water mark on the coast of Louisiana and outside of the inland waters, extending seaward twenty-seven marine miles and bounded on the east and west, respectively, by the eastern and western boundaries of the State of Louisiana," and (b) requiring that Louisiana account to the United States for money received by the State after June 23, 1947, from the area so designated. Over opposition, the requested leave was granted. *United States* v. *Louisiana*, 337 U. S. 902 (1949). Louisiana was directed to answer. 337 U. S. 928 (1949). The State, however, filed a demurrer and motions to dismiss and for other relief. These were overruled and denied. 338 U. S. 806 (1949).

Louisiana then did answer, placing in issue the claims of the United States and asserting affirmative defenses. The plaintiff's responsive motion for judgment was set down for argument. The Court ruled that *United States* v. *California*, 332 U. S. 19 (1947), then recently decided, controlled the Louisiana litigation. In that case, the Court had held that California was not the owner of the marginal belt along its coast beyond the low-water mark, and that the Federal Govern-

ment had primary rights in and power over that belt. The rationale, it was said, was that "[n]ational rights must therefore be paramount in that area." 339 U. S. 699, 704 (1950). A decree was entered enunciating the United States' possession of "paramount rights" and Louisiana's lack of "title thereto or property interest therein"; enjoining Louisiana from carrying on activities in the area for the purpose of taking petroleum, gas, or other mineral products without authority first obtained from the United States; and stating that the United States was entitled to an accounting from Louisiana of sums derived by the State from the area since June 5, 1950 (the date of the Court's opinion). 340 U. S. 899 (1950). A like decree was entered in a companion case against Texas. *United States* v. *Texas*, 340 U. S. 900 (1950).

The Submerged Lands Act, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.*, passed May 22, 1953, came in response to these rulings. By that statute, the United States released to the coastal States its rights in the submerged lands within stated limits and confirmed its own rights therein seaward of those limits. The Act was sustained as a constitutional exercise of Congress' power to dispose of federal property. *Alabama* v. *Texas*, 347 U. S. 272 (1954).

The passage of the Act, however, did not end the controversy. Opposing claims continued to be asserted, and Louisiana continued to conduct leasing activities with respect to submerged lands in the disputed area. Accordingly, in 1956, the United States sought and was granted leave to file a complaint in a new suit (the present litigation) against Louisiana. 350 U. S. 990. The Court forthwith enjoined Louisiana and the United States "from leasing or beginning the drilling of new wells in the disputed tidelands area . . . unless by agreement of the parties filed here." 351 U. S. 978 (1956). In response to this ruling, on October 12, 1956, the parties entered into an Interim Agreement designed to permit further development of the submerged lands in dispute. Interpretation of this agreement is the central task of this

opinion. The lawsuit continued, and in 1957 the other Gulf States in effect were requested to intervene. 354 U. S. 515.

In due course this Court held, among other things, that the Submerged Lands Act granted Louisiana ownership "to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be." 363 U. S. 1, 79 (1960). A "Final Decree" was entered accordingly. 364 U. S. 502 (1960). That decree, like the one of 1950 in the earlier litigation, confirmed in the United States as against Louisiana all the land, minerals, and other natural resources underlying the Gulf of Mexico more than three geographic miles seaward from the coastline; recited that Louisiana had no interest therein and was enjoined from interfering with the rights of the United States; stated that as against the United States Louisiana was entitled to all the lands, minerals, and other natural resources underlying the Gulf extending seaward from its coastline three geographic miles, and that the United States was not entitled to any interest therein (with a stated exception inapplicable here); and provided that whenever the location of the coastline of Louisiana should be agreed upon or determined, the State was to render the United States an appropriate accounting of all sums derived by it since June 5, 1950, "either by sale, leasing, licensing, exploitation or otherwise from or on account of any of the lands or resources [decreed to the United States] . . . provided, however, that as to the State of Louisiana the allocation, withdrawal and payment of any funds now impounded under the Interim Agreement between the United States and the State of Louisiana, dated October 12, 1956, shall, subject to the terms hereof, be made in accordance with the appropriate provisions of said Agreement." *Id.*, at 503.

On December 13, 1965, a supplemental decree was entered. 382 U. S. 288. It generally reconfirmed the respective rights of the United States and Louisiana as theretofore determined; released to the United States all sums held impounded by it

under the Interim Agreement and attributable to the lands confirmed in the United States; released to Louisiana all sums held impounded by it under that agreement and attributable to the lands confirmed in the State; directed, within 75 days, the payments required of the respective parties, and an accounting from each of sums attributable to lands confirmed in the other, *id.*, at 293; and retained jurisdiction particularly with respect "to the remainder of the disputed area," *id.*, at 295.

The determination of the exact location of the Louisiana coastline remained for resolution. In *United States* v. *California*, 381 U. S. 139 (1965), this Court held that Congress had left to the courts the task of defining "inland waters," and the Court adopted for purposes of the Submerged Lands Act the definitions contained in the international Convention on the Territorial Sea and the Contiguous Zone, ratified by the United States in 1961. [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639. In the present litigation, in March 1969, the Court held that that part of Louisiana's coastline which, under the Submerged Lands Act, consists of "the line marking the seaward limit of inland waters," see 43 U. S. C. § 1301 (c), is also to be drawn in accordance with the definitions of the Convention. It decided to refer to a Special Master particularized disputes over the precise boundary between the submerged lands belonging to the United States and those belonging to Louisiana. 394 U. S. 11. A Master was appointed. 395 U. S. 901 (1969).

A second supplemental decree was entered December 20, 1971. 404 U. S. 388. That decree, among other things, determined that the United States had exclusive rights to an area of the Continental Shelf lying more than one foot seaward of a line therein described; recited that sums held impounded by the United States under the Interim Agreement and derived from those lands were released to the United States, *id.*, at 389; and provided that leases of lands lying partly within that area and partly landward thereof were not affected

by the decree, so that revenues derived therefrom were to remain subject to impoundment, *id.*, at 402.

Still a third supplemental decree was entered October 16, 1972. 409 U. S. 17. By this decree, the Court ruled that, with a stated exception, Louisiana was entitled to all lands, minerals, and other natural resources lying more than one foot landward of a line therein described and seaward of the ordinary low-water mark on the Louisiana shore, *id.*, at 17–18; that leases of land partly within that area and partly seaward thereof were not affected by the decree, so that revenues derived therefrom were to remain subject to impoundment; and that all sums held impounded by Louisiana or the United States under the Interim Agreement derived from leases of lands wholly within areas allotted to Louisiana were released to that State, *id.*, at 31.

The Special Master thereafter filed his report dated July 31, 1974. Exceptions to that report made by the United States and by Louisiana, respectively, were overruled, the Special Master's recommendations were accepted, and the parties were directed to prepare and file a proposed decree establishing "a baseline along the entire coast of the State of Louisiana." 420 U. S. 529, 530 (1975). The parties were able to agree, and a fourth supplemental decree was entered June 16, 1975. 422 U. S. 13. Exclusive rights were affirmed in the respective parties in areas lying landward or seaward of a line three geographical miles seaward of the baseline, and impounded sums were released accordingly. *Id.*, at 13–14. Cross-payments within 90 days and cross-accountings within 60 days were ordered. *Id.*, at 15. The decree recited: "It is understood that the parties may be unable to agree on . . . whether interest may be due on funds impounded pursuant to the Interim Agreement of October 12, 1956." *Id.*, at 17. The required accountings were filed and referred to the Special Master. 423 U. S. 909 (1975).

The Master held hearings on the accountings and on the objections that were interposed. He now has filed his supple-

mental report dated August 27, 1979. Louisiana and the United States have each filed exceptions to that report.

II

As was observed at the beginning of this opinion, the parties and this Court should be near the end of this long-enduring litigation. The territorial dispute has been resolved. The boundary between federal and state submerged lands, except for the formal entry of yet another supplemental decree describing that boundary, has been fixed. And each party has been directed to account for revenues derived from areas adjudicated to the other sovereign.

The Special Master's supplemental report recites the filing of the several accountings by Louisiana and by the United States; the respective objections made to those accountings; the agreements reached by the parties; and the fact that three issues remain unresolved. As phrased by the Master, these issues are:

> First issue—Is the United States obligated to account for and pay to the State of Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds?
>
> Second issue—Does Louisiana have the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1?
>
> Third issue—Does Louisiana have the obligation to account for as unimpounded funds and to pay to the United States money collected by it as severance taxes on minerals removed from areas subsequently determined to belong to the United States?

The Master's ruling on each issue was in the negative. He has recommended that all exceptions to the accountings be overruled, and that the accountings be approved as filed.

Before this Court, Louisiana has filed exceptions only to the Special Master's recommendations as to the first stated

issue. The United States has filed exceptions only as to the second stated issue. The Master's recommendations as to the third stated issue, concerning money collected by Louisiana as severance taxes, thus are not the subject of any exceptions here.[1] In the absence of present controversy we accept the Special Master's recommendations on that issue. We consider the exceptions to the other issues in turn.

III

The First Stated Issue

The Interim Agreement of October 12, 1956, between the United States and Louisiana, referred to in this Court's "Final Decree" of December 12, 1960, see 364 U. S., at 503, came into being after the Court, on June 11, 1956, had provided:

> "IT IS FURTHER ORDERED that the State of Louisiana and the United States of America are enjoined from leasing or beginning the drilling of new wells in the disputed tidelands area pending further order of this Court unless by agreement of the parties filed here." 351 U. S. 978.

The Interim Agreement recites that the parties "desire to provide for the impoundment of . . . sums . . . payable under mineral leases in the disputed area, pending the final settlement or adjudication of the said controversy." App. to Reply Brief for Louisiana 9a. It divided the submerged lands off the Louisiana coast into four zones therein described. The zone contiguous to the coastline was designated as Zone 1, the next most seaward as Zone 2, the next as Zone 3, and the most

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[1] The United States asserts:

"For a variety of reasons—including a reluctance to burden the Court with an esoteric and complex question of no recurring importance—we are not excepting to the Master's conclusion with respect to the State's obligation to pay over to the United States the severance taxes attributable to the extraction of minerals beyond State jurisdiction." Memorandum of United States in Support of Exception, p. 3.

seaward as Zone 4. *Id.*, at 10a–11a. It described the area comprising Zones 2 and 3 as the "disputed area," *id.*, at 11a, and it conferred upon the United States (with certain exceptions) the responsibility for collecting receipts from the disputed zones, *id.*, at 26a–27a. By ¶ 7 (a), the United States agreed (with exclusions not material here) "to impound in a separate fund in the Treasury of the United States a sum equal to all . . . payments heretofore or hereafter paid to it for and on account of each lease, or part thereof, in Zones 2 and 3." *Id.*, at 14a. Certain other payments were to be impounded by Louisiana. Paragraph 9 of the agreement then provides:

> "[T]he impounded funds provided for herein shall be held intact, in a separate account for each lease or portion thereof affected, by each party until title to the area affected is determined. Whereupon, except as otherwise herein provided:
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> . . . . .
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> "(b) Any funds derived from an area finally determined to be owned by the State of Louisiana [with an exception not here material] shall be taken from the separate and impounded fund in the Treasury of the United States provided for herein,"

and paid to the appropriate officer of Louisiana. *Id.*, at 18a–19a.

Pursuant to these provisions of the Interim Agreement, the United States collected and retained payments on mineral leases for operations within the designated disputed area. As a consequence of the first supplemental decree, entered December 13, 1965, see 382 U. S., at 293, the United States paid Louisiana some $34 million of impounded funds. Indeed, with an additional payment of some $136 million in 1975, pursuant to the supplemental decree of June 16, 1975, see 422 U. S., at 14–15, all payments due Louisiana from the funds impounded by the United States have been made. But

the United States has not paid Louisiana any interest on the funds so impounded, and has not made any payment for the use of those funds while they were held in the United States Treasury. Louisiana asserts a claim for such interest, apparently approximating $88 million, or for the value of the use of the money during the period of impoundment, and the United States resists these claims.

Louisiana's position is at least fourfold: (1) The impoundment provisions of the Interim Agreement implied a trust that imposed on the United States the fiduciary duty of a trustee in its handling of the impounded funds. It is said that an escrow arrangement in fact was established. The presence of a trust is evident from the conduct and relationship of the parties, from documentary evidence, and from admissions by federal officials. (2) The United States used Louisiana's money for its own purposes and without authority under the Interim Agreement. The funds were deposited in the general account of the Treasurer of the United States where they were available, and used, to meet cash needs of the Federal Government. (3) The United States had the duty to invest the impounded funds for the benefit of both parties. This duty is implied from the provisions of the agreement; is imposed upon the United States as a trustee as a matter of law; was breached by the refusal of the United States to honor a request by Louisiana to invest the funds; is supported by the provisions of 31 U. S. C. § 547a to the effect that "[a]ll funds held in trust by the United States . . . shall be invested" in interest-bearing securities; and is not limited by the supplemental decree of June 16, 1975. (4) Equitable remedies to prevent the unjust enrichment of the United States at the expense of Louisiana are appropriate.

We find no merit in any of Louisiana's contentions. The Interim Agreement provided only that the payments made to the United States on each lease within the disputed area were to be impounded "in a separate fund in the Treasury of the United States" and, upon determination of the owner-

ship of the land, were to be taken from that separate and impounded fund and paid to the party entitled to them. The agreement contains no express provision for the payment of interest or for the use of the funds or for investment. Neither do we find anything in the agreement's use of the word "impound" or, indeed, in Louisiana's characterization of the arrangement as an escrow (a word that does not appear in the agreement), that implies an obligation on the part of the United States to pay interest or to pay for the use of the money. The word "impound," in its application to funds, means to take or retain in "the custody of the law." Black's Law Dictionary 681 (5th ed., 1979); Bouvier's Law Dictionary 1515 (8th ed., 1914). That obligation, as is an escrow, is to hold and deliver property intact.

What actually happened here, of course, was that, as the funds were paid to the United States, the lessees' checks were cashed and the resulting cash was commingled with general funds of the Treasury and used in governmental operations. A separate account, No. 14X6709, nonetheless, was established on the books of the Treasury for these payments, and a credit entry covered every receipt from the disputed area. The United States did not stockpile that inflowing cash in a far corner of the Government vaults. But the special account was maintained and it accurately recorded the increasing potential liability of the United States to Louisiana. This was much more than a recordkeeping device. The receipts were never treated as governmental revenues. The recognition of a contingent liability, corresponding to the cash deposited, enabled the United States to make prompt payment to Louisiana without special congressional authorization or appropriation. There was no proof or even suggestion that at any time there were insufficient funds in the United States Treasury to pay any amount that might be determined to be due Louisiana from the impoundment.

Apart from constitutional requirements, in the absence of specific provision by contract or statute, or "express con-

sent . . . by Congress," interest does not run on a claim against the United States. *Smyth* v. *United States*, 302 U. S. 329, 353 (1937); *Albrecht* v. *United States*, 329 U. S. 599, 605 (1947); *United States* v. *N. Y. Rayon Importing Co.*, 329 U. S. 654, 658–659 (1947). See also 28 U. S. C. § 2516. It follows that the same is true as to any claim of duty to invest.

We are persuaded, also, that the omission, in the Interim Agreement, of any provision for interest was a conscious one. When the agreement was signed in 1956, almost $60 million in disputed revenues already had accumulated. The importance of any interest obligation was obvious. And pertinent here is the fact that two of Louisiana's negotiators candidly conceded that they did not insist on an interest clause because they knew the United States would not agree to one. Tr. 70, 95, 98, 99, 102, 103, 163. Nor does Louisiana's intimation that it was willing to pass the matter in silence because the agreement was expected to be short lived carry weight. The agreement itself specified no term, and, in its ¶ 13, it provided for operations after a year had elapsed.

We note, too, that Louisiana is not in a position to assert that it was unaware that the funds were not invested or that it did not know that the United States held itself not responsible for interest. The State received regular monthly reports of the amounts credited to the impounded account, as the agreement's ¶ 8 required. Those reports reflected no interest. Louisiana accepted the $34 million distribution, made pursuant to the 1965 decree, without complaint about the absence of interest. And communications flowed from officers of the State and its representatives in Congress, suggesting the deposit of some of the funds in Louisiana banks, presumably so that they might enjoy the free use of those funds. The Louisiana Legislature, it is true, on June 6, 1967, by House Concurrent Resolution No. 251, did call upon the United States "to take such steps as are necessary to effect a prudent and effective investment of the funds now and here-

after so impounded." See 1967 Louisiana Legislative Calendar 161–162. The quoted language, however, was only precatory and suggestive; it was not demanding. At most, it amounted to a request for a change of status. A Treasury official, pleading absence of authority, promptly returned a negative answer. In fact, Louisiana apparently never took the position that it was entitled to interest upon, or payment for the use of, its share of the impounded funds until 1975 when it filed its objections to the accounting. And Louisiana made no request for modification of the Interim Agreement. The State thus acquiesced for two decades.

We conclude that the United States fulfilled the obligations imposed upon it by the agreement; that the impoundment served its intended purpose; that there is no liability on the part of the United States for interest or for the use of the funds; and that the United States has no further obligation for payment beyond those it has performed.

IV

The Second Stated Issue

This issue concerns money paid to Louisiana by oil and gas lessees since 1950 in respect to Zone 1 areas now adjudicated to the United States. Louisiana asserts a right permanently to retain that money. The amount involved is some $19 million.[2]

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[2] Louisiana's total receipts attributable to the federal lands in Zone 1 since 1950 amount to some $23 million. This figure, however, includes the severance taxes (the third stated issue) to which the United States no longer makes claim. The United States calculates that Louisiana will be indebted to it for some $19 million if its exception to the second stated issue is sustained. It concedes, however, that Louisiana would be entitled to an offset for unimpounded moneys, received by the United States from Louisiana's submerged lands, in excess of $5 million. Memorandum of United States in Support of Exception, pp. 40–41, n. 23. We recognize that Louisiana argues that its indebtedness will be much smaller even if the United States' position is sustained.

During the past three decades these federal lands have been administered by Louisiana. Before the Interim Agreement of 1956, Louisiana acted unilaterally in leasing those areas; after that date, it acted with the acquiescence of the United States given by the agreement.

The Special Master concluded that, by permitting Louisiana to administer Zone 1, the United States waived its rights to demand an accounting of, and payment with respect to, the revenues derived from its lands in the Zone. The Master did acknowledge that the very opposite result "would certainly be the case in the absence of any adjudication or agreement between the parties to the contrary." Supplemental Report 15. He found a waiver on the part of the United States, however, that centered in a provision of the Outer Continental Shelf Lands Act, 43 U. S. C. § 1336, which he read as foreclosing the federal claim to the money. He noted that the Interim Agreement contained no specific language regarding payments derived from leases on areas lying within Zone 1 or Zone 4, although it did with respect to revenues derived from leases on areas lying within Zones 2 and 3. He stressed ¶ 6 of the agreement, which provided that notwithstanding any adverse claim, Louisiana, as to any area in Zone 1 (and the United States, as to any area in Zone 4), "shall have exclusive supervision and administration, and may issue new leases and authorize the drilling of new wells and other operations without notice to or obtaining the consent of the other party." App. to Reply Brief for Louisiana 14a. Louisiana, in fact, collected rentals on mineral leases on areas in Zone 1. The United States did not question Louisiana's right to do so. The Master observed that Louisiana anticipated the possibility that some portions of Zone 1, upon which it granted leases, might ultimately be adjudged to belong to the United States, for it inserted in almost all the leases a provision to the effect that it was granting the right to extract minerals only from those parts of the leasehold areas owned by Louisiana. The conclusion the Master drew was that Louisiana was entitled to

keep all rentals derived prior to the entry of the supplemental decree of June 16, 1975, from leases upon areas lying within Zone 1, and that the United States had no right to recover them.

We are constrained to disagree with the Special Master on this issue. We accept the submission of the United States that the "ground rules" of the controversy were laid down in 1950. The Court's very first decree, issued December 11, 1950, specified, 340 U. S., at 900, that the United States was entitled to an accounting from Louisiana of all sums derived by the State from lands adjudicated to the United States. This was a principle laid down independently of the not-yet-enacted Submerged Lands Act and Outer Continental Shelf Lands Act. The principle had its roots in the Court's decision in *United States* v. *California*, 332 U. S. 19 (1947).

The Submerged Lands Act of 1953 did not change the ground rules. It released and "confirmed" a coastal belt to the coastal States, and the United States thereby "release[d] and relinquishe[d] all claims of the United States . . . for money . . . arising out of [past] operations" within the belt. 43 U. S. C. § 1311 (b)(1). For areas seaward of that belt, however, the States' obligation to account and pay remained unchanged. This Court's decision of May 31, 1960, in the second suit, was unambiguous on this matter, and the Court made plain the continued vitality of the original ground rules. 363 U. S., at 7, 83, and n. 140. The cited footnote stated flatly:

> "On June 5, 1950, the date of this Court's decision in the *Louisiana* and *Texas* cases, all coastal States were put on notice that the United States was possessed of paramount rights in submerged lands lying seaward of their respective coasts. . . . [T]he United States remains entitled to an accounting for all sums derived since June 5, 1950, from lands not so relinquished [by the Submerged Lands Act]."

The preceding Interim Agreement of October 1956 was forced into being by continuing conflict, by an injunction obtained by Louisiana in its courts, and by the injunction issued by this Court on June 11, 1956. See 351 U. S. 978. As we have noted, the agreement divided the submerged lands into the four zones hereinabove described. The first, nearest the shore, was to be administered by Louisiana. The others were to be administered by the United States, except for certain leases already granted by Louisiana in Zone 2 and the requirement of state concurrence for any new leasing in that zone. Receipts from Zones 2 and 3 were to be "impounded." No such impoundment obligation, however, was imposed on the United States with respect to Zone 4 or upon Louisiana with respect to Zone 1.

It turned out that the seaward boundary of Louisiana's submerged lands, as finally determined, does not coincide with the line that divided Zones 1 and 2. The final boundary meanders back and forth across the agreement's line between those two Zones producing bulges on each side. Louisiana has been successful in some of its claims to lands within Zone 2, and the United States has accounted for and paid over funds received from those areas. Yet Louisiana denies any corresponding obligation to account for and pay over revenues it received from those portions of Zone 1 that the United States has successfully claimed.

Louisiana asserts that the United States, by the Interim Agreement, waived and abandoned its right to revenues from Zone 1 during the life of the agreement. The agreement itself contains no express words of waiver. On the other hand, neither does it provide specifically for eventual repayment of any revenues from portions of Zone 1 ultimately adjudicated to the United States. But the agreement does recite: "nor shall any provision hereof be the basis for . . . waiving in any manner any right, interest, claim, or demand whatsoever of either party now pending in the proceedings above referred

to, or otherwise." App. to Reply Brief for Louisiana 9a. And it further recites that the baseline from which the several zones were measured had not been surveyed or finally fixed, and that no inference was to be drawn from the use of that baseline. *Id.*, at 10a. These provisions of the agreement persuade us that each party specifically was reserving any monetary claims it might have outside Zones 2 and 3.

It was to be expected, of course, that most of Zone 1 would ultimately be adjudicated to Louisiana. This fact accounts for the decision to permit the State to enjoy, for the interim, the revenues from that area.[3]

The Outer Continental Shelf Lands Act was the complement of the Submerged Lands Act, for it provided in detail for the administration of federal submerged lands lying beyond those granted to the coastal States. It authorized an agreement with a State "respecting operations under existing mineral leases" and the issuance of new leases "pending the settlement or adjudication" of a controversy as to ultimate ownership. 43 U. S. C. § 1336. This provision is referred to in the Interim Agreement, and it is the one on which the Special Master focused his attention. The Master placed particular stress on the following sentence in the statute:

> "Payments made pursuant to such agreement, or pursuant to any stipulation between the United States and a State, shall be considered as compliance with section 1335 (a)(4) of this title."

The Master viewed the payments made by Louisiana's lessees in Zone 1 as governed by this language and concluded

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[3] We see no substance in the fact that most, but not all, of the leases granted by Louisiana in Zone 1 referred to lands owned by the State. Some of these antedated the Interim Agreement, and we read them all as merely repeating an established pattern. The recital hardly is acceptable as a device that is at once self-serving for Louisiana and capable of being detrimental to the lessees who surely thought they were getting, and paying for, full value.

that any federal claim with respect to those payments was foreclosed.

We do not so read that sentence. The provision, we feel, means no more than that a lessee is not in default so long as the agreement remains in effect and he makes the payments required by it. The Act protects the lessee. Whatever the lessee's ultimate obligation, if any, to the United States might turn out to be, there is no basis for reading into § 1336 a waiver by the United States of Louisiana's independent duty to account, or a waiver of any claim for money due the United States. The State's obligation does not derive from the Shelf Lands Act; it was imposed by this Court's 1950 decree, was not waived by the Interim Agreement, and is not excused by the quoted provision of the Shelf Lands Act.

This conclusion is buttressed by the fact that until 1975 the actions of the parties and the rulings of this Court consistently indicate that this was the common understanding. The 1960 decree was prepared by the parties at the invitation of the Court. 363 U. S., at 85. The decree itself recognized that once the coastline was determined, Louisiana was to account and to pay. 364 U. S., at 503. The decree of December 13, 1965, although distinguishing between impounded and nonimpounded funds, contained no waiver of any obligation relating to receipts that were not impounded. 382 U. S., at 294. This Court's decision of March 17, 1975, 420 U. S. 529, and the implementing decree of June 16, 1975, 422 U. S. 13, recognized that in some places the true limit of Louisiana's submerged lands was shoreward of the Zone 1 line. That decree, also, was proposed by the parties at the invitation of the Court. 420 U. S., at 530. It declared rights divided by a specified boundary line which, in many places, did not correspond with the seaward edge of Zone 1. It required each party to account for and to pay over impounded revenues attributable to lands adjudicated to the other. 422 U. S., at 15–16. We see no reason to conclude that those accounting provisions were included only for informational

purposes, rather than to spell out the parties' pecuniary obligations.[4]

V

In summary: We accept, upon acquiescence of the parties, the Special Master's recommendations that Louisiana has no obligation to account for and to pay to the United States money collected by it as severance taxes on minerals removed from areas adjudicated to the United States. We agree with and accept the Special Master's recommendations that the United States is not obligated to account for and pay Louisiana either the value of the use of Louisiana's share of the impounded funds or interest upon that portion of those funds. We therefore overrule Louisiana's exceptions to the supplemental report of the Special Master. We disagree with and do not accept the Special Master's recommendations with respect to Louisiana's obligation to account for revenues derived by it from mineral leases on areas within Zone 1 adjudicated to the United States. Instead, we sustain the exception of the United States and rule that Louisiana does have the obligation to account for such revenues received by it. Subject to this ruling, the respective accountings are approved as filed.

We leave to the Special Master and the parties the determination of the final amount due and owing, and of the

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[4] We note that the conclusion we reach should entail no pressing hardship for Louisiana. Apart from the fact that Louisiana will be disgorging United States funds it has enjoyed for many years and will be doing so in depreciated dollars without interest, the United States has represented to this Court that accumulated impounded receipts attributable to state lands from "split leases" exceed the sum now claimed from Louisiana. The accounting of the split lease revenues is not yet due. See 422 U. S., at 16–17. The United States asserts, however, that it is content to defer payment from Louisiana until the split lease impounded fund accounting is settled, and to waive the benefit of the absence of offset provisions if Louisiana does likewise. Memorandum of United States in Support of Exception, p. 40.

method of payment. The case is remanded to the Special Master for further proceedings.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I concur in the Court's opinion except with respect to its disposition of the "second stated issue." *Ante*, at 266–272. As framed by the Special Master, the second issue is whether Louisiana has "the obligation to account for revenues received by it from mineral leases on areas lying within Zone 1. . . ." *Ante*, at 260. The Special Master found that the State had no such obligation. The United States filed an exception, and the Court sustains it.

I would accept the recommendations of the Master on all three issues, including his finding that Louisiana has no obligation to account for revenues derived from Zone 1. The latter finding certainly is not free from doubt, but the able Master has a more intimate familiarity with this "long-continuing and sometimes strained controversy," *ante*, at 254, than an appellate judge possibly can acquire by studying only the available record. Although we have the duty to make an independent judgment, I cannot conclude that the Master's finding on the second stated issue is erroneous. Accordingly, I dissent on this issue.

AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 79–1. Argued February 26, 1980—Decided May 12, 1980

After filing suit in a New York state court against petitioner shipowner to recover damages, on grounds of negligence and unseaworthiness, for personal injuries sustained while working aboard petitioner's vessel in New York waters, respondent husband sought leave to amend his complaint to add his spouse as a plaintiff for loss of society. The trial court denied the motion to amend, but the Appellate Division of the New York Supreme Court reversed and granted the motion to amend, reasoning that the case was controlled by *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, which held that, under the nonstatutory maritime wrongful-death remedy, the widow of a longshoreman mortally injured aboard a vessel in state territorial waters could recover damages for the loss of her deceased husband's society. The New York Court of Appeals affirmed.

Held: The judgment is affirmed. Pp. 277–286; 286.

46 N. Y. 2d 634, 389 N. E. 2d 461, affirmed.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS, concluded:

1. The Court of Appeals' judgment upholding the legal tenability of the wife's claim for loss of society, although not "final" or within a categorical exception to strict finality when originally entered, will, as a practical matter, be treated as falling within such an exception, where, after certiorari was granted in this Court, the case, including the loss-of-society claim, was tried and respondent husband prevailed, the appeal from the trial verdict will not challenge the element thereof awarding damages for loss of society, and no federal issue other than whether the wife has a cause of action under general maritime law for loss of society remains. Pp. 277–279.

2. General maritime law authorizes the wife of a harbor worker injured nonfatally aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society. Although *Sea-Land Services, Inc.* v. *Gaudet*, *supra*, upheld a claim for loss of society in the context of a wrongful-death action, it provides the conclusive decisional recognition of a right to recover for such loss, there being no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society. Nor

is the reach of *Gaudet's* principle limited by the fact that no right to recover for loss of society due to maritime injury has been recognized by Congress under the Death on the High Seas Act or the Jones Act. Neither statute embodies an "established and inflexible" rule foreclosing recognition of a claim for loss of society by judicially crafted general maritime law. Pp. 279–286.

MR. JUSTICE POWELL, while believing that *Sea-Land Services, Inc.* v. *Gaudet, supra,* was decided wrongly, concurred in the judgment because he saw no rational basis for drawing a distinction between fatal and nonfatal injuries. P. 286.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which WHITE, BLACKMUN, and STEVENS, JJ., joined. BURGER, C. J., concurred in the judgment. POWELL, J., filed an opinion concurring in the judgment, *post,* p. 286. MARSHALL, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, *post,* p. 286.

Stephen K. Carr argued the cause and filed briefs for petitioner.

Paul C. Matthews argued the cause and filed a brief for respondent Alvez. *Peter M. Pryor* and *William M. Kimball* filed a brief for respondent Joseph Vinal Ship Maintenance, Inc.

MR. JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS joined.

Sea-Land Services, Inc. v. *Gaudet,* 414 U. S. 573 (1974), held that under the nonstatutory maritime wrongful-death action fashioned by *Moragne* v. *States Marine Lines,* 398 U. S. 375 (1970), the widow of a longshoreman *mortally* injured aboard a vessel in state territorial waters could recover damages for the loss of her deceased husband's "society."[1] The

[1] "The term 'society' embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S., at 585.

question in this case is whether general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society. We conclude that general maritime law does afford the wife such a cause of action.

I

Respondent Gilberto Alvez lost an eye while working as a lasher aboard petitioner's vessel SS *Export Builder* in New York waters. He commenced an action for damages against petitioner in the New York Supreme Court on grounds of negligence and unseaworthiness.[2] Leave to amend respondent's complaint to add his spouse as a plaintiff for loss of society was denied by the New York Supreme Court, Special Term, on the authority of *Igneri* v. *Cie. de Transports Oceaniques*, 323 F. 2d 257 (CA2 1963), cert. denied, 376 U. S. 949 (1964), in which the Court of Appeals for the Second Circuit ruled that an injured longshoreman's wife was not entitled to compensation for loss of her husband's society. App. to Pet. for Cert. A1. The Appellate Division of the New York Supreme Court reversed, and granted Alvez' motion to amend, reasoning that *Gaudet*, rather than *Igneri*, was controlling authority. 59 App. Div. 2d 883, 399 N. Y. S. 2d 673 (1st Dept. 1977). Upon certification (App. to Pet. for Cert. A6–A7), the New York Court of Appeals agreed that the vitality of *Igneri* had been sapped by *Gaudet* and by other developments in the law, and held that Mrs. Alvez should be permitted to maintain her claim for loss of society under maritime law. 46 N. Y. 2d 634, 389 N. E. 2d 461 (1979).[3] We granted certiorari. 444 U. S. 924 (1979). We affirm.

[2] Alvez' injury was sustained before the effective date of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* Petitioner also impleaded Alvez' employer, Joseph Vinal Ship Maintenance, Inc., for indemnification.

[3] Since *Gaudet*, one Federal Court of Appeals has expressly aligned itself with the *Igneri* rule, *Christofferson* v. *Halliburton Co.*, 534 F. 2d 1147

II

At oral argument, the Court raised, *sua sponte*, the question whether this case fell within the Court's statutory jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." 28 U. S. C. § 1257.

The question is a close one. The New York Court of Appeals order granting leave to amend the complaint was only the predicate to a decision on the merits of the claim for loss of society; that order, therefore, is not "final" in the strict sense of a decree that leaves nothing further to be addressed by the state courts. Nor does the Court of Appeals judgment, as originally entered, readily fit into any of the categorical exceptions to strict finality which the Court has developed in construing § 1257. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 476–487 (1975).[4] Thus, were the case in the posture in which it stood when the petition for certiorari was filed, we might well determine that the judgment lacked sufficient characteristics of finality to warrant an assertion of our appellate jurisdiction.

Since the writ of certiorari was granted, however, this case—including the claim for loss of society—has been tried, and respondent Alvez has prevailed. Tr. of Oral Arg. 7–8. Counsel for petitioner American Export Lines has informed the Court at oral argument that petitioner's appeal from the trial verdict against it will not challenge that element of the verdict which awarded damages for loss of society to Mrs.

(CA5), rehearing en banc denied, 542 F. 2d 1174 (1976), and a number of state and federal district courts have divided on the issue, compare, *e. g.*, *Pesce* v. *Summa Corp.*, 54 Cal. App. 3d 86, 126 Cal. Rptr. 451 (1975), and *Giglio* v. *Farrell Lines, Inc.*, 424 F. Supp. 927 (SDNY 1977), appeal denied, No. 77–8014 (CA2, Feb. 17, 1977), with *Davidson* v. *Schlussel Reederei KG*, 295 So. 2d 700 (Fla. App. 1974), and *Westcott* v. *McAllister Bros., Inc.*, 463 F. Supp. 1039 (SDNY 1978).

[4] See Note, The Finality Rule for Supreme Court Review of State Court Orders, 91 Harv. L. Rev. 1004 (1978).

Alvez. *Id.*, at 10, 41–42.[5] Furthermore, it is conceded that no federal question, except that which we are now asked to resolve, remains in the litigation. *Id.*, at 6.[6]

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[5] "Question: Mr. Carr [attorney for petitioner], what happens if the appellate division reverses?

"Mr. Carr: If the appellate division reverses, it would not reverse on the question of Juanita Alvez's claim for consortium. If the appellate division reverses, it would probably reverse on—

"Question: Correct.

"Mr. Carr: —instructions to the jury that may have been—

"Question: Then the appellate division leaves that intact, the $50,000, right?

"Mr. Carr: Yes, sir.

. . . . .

"Question: Could I ask you if the New York court system has finally disposed of this federal issue of the right of the wife?

"Mr. Carr: The New York state court system has finally disposed of the issue of the right of the wife.

"Question: You have lost at trial?

"Mr. Carr: Well, I don't like to put it that way.

"Question: Well, judgment has gone against you, your client?

"Mr. Carr: There is judgment against my client. . . .

"Question: Well, on the consortium issue the judgment has gone against your client?

"Mr. Carr: Yes, indeed it has, Your Honor.

"Question: And that issue has not—if you want to appeal in the state court system, the right of the wife is not subject to relitigation, is it?

"Mr. Carr: The right of the wife is final as far as the New York state court system is concerned.

"Question: Except as to amount, I suppose.

"Mr. Carr: Except as to amount.

"Question: Conceivably a reviewing court might reduce it.

"Mr. Carr: With respect to excessiveness, that is so. But as far as the wife's right of consortium, that right is final in the state courts and cannot be relitigated in that forum.

. . . . .

"Mr. Carr: The appellate division would say this is res judicata, this has been decided by the New York state Court of Appeals and does not permit you to pursue the matter further."

[6] The dissent argues, *post*, at 287, n. 1, that petitioner's counsel's assertion that the New York courts would not reverse Mrs. Alvez' trial victory,

So far as respondent's wife's claim for loss of society is concerned, it thus appears that "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting, supra,* at 480; see *Radio Station WOW* v. *Johnson,* 326 U. S. 120, 123–127 (1945). As a practical matter, then, we conclude that the judgment below upholding the legal tenability of Mrs. Alvez' claim falls—at present—within a categorical exception to strict finality.[7] "[N]ow that the case is before us . . . the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148, 153 (1964).

III

In *Igneri* v. *Cie. de Transports Oceaniques,* the Court of Appeals for the Second Circuit rejected the loss-of-society claim of a longshoreman's wife in a maritime personal injury

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Tr. of Oral Arg. 10, is contradicted by statements of *respondent Alvez'* counsel indicating or implying that American Export Lines "might find some grounds for error in the record," *id.,* at 21; see *id.,* at 20. But *respondent Alvez'* counsel could have said nothing else: since he is not representing petitioner American Export Lines, respondent Alvez' attorney could hardly have conceded any element of petitioner's case in the state courts. What is relevant, then, is *petitioner's* counsel's answer to this Court that "the appellate division . . . would not reverse on the question of Juanita Alvez's claim for consortium. . . . [The New York courts] would leave it intact." *Id.,* at 10. Since American Export Lines' counsel was aware of this Court's concerns, it is fair to read this response as a concession by counsel—who was in a position to know his client's strategy in the state courts—that Mrs. Alvez' claim was no longer in jeopardy.

[7] Our ruling on finality only extends, of course, to Mrs. Alvez' claim for loss of society, since we do not understand counsel for petitioner to concede that the other claims tried are beyond challenge. The fact that these other claims are nonfinal, however, need not preclude us from considering the final determination as to Mrs. Alvez' claim. Cf. *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148, 153 (1964).

action. The *Igneri* opinion was carefully constructed within the framework of then-applicable doctrines governing maritime remedies. At the time, there was no clear decisional authority sustaining a general maritime law right of recovery for loss of society. 323 F. 2d, at 265–266; compare *Savage* v. *New York, N. & H. S. S. Co.*, 185 F. 778, 781 (CA2 1911) (adopting opinion of Hough, District Judge) (dictum), with *New York & Long Branch Steamboat Co.* v. *Johnson*, 195 F. 740 (CA3 1912). It was also thought established, as *Igneri* stated, "that the damages recoverable by a *seaman's* widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium," 323 F. 2d, at 266 (emphasis added); see *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59 (1913). Too, it was far from evident that the rule of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), entitling a longshoreman to maintain an action for unseaworthiness, would extend to permit recovery for loss of society by his spouse. 323 F. 2d, at 267–268. Thus, the principles of maritime law prevalent in 1963 militated against, rather than supported, the creation of a right to recover for loss of society in *Igneri*.

Subsequent developments, however, have altered the legal setting within which we confront a claim for loss of society due to personal injury. In 1970, *Moragne* v. *States Marine Lines*, 398 U. S. 375, overruled *The Harrisburg*, 119 U. S. 199 (1886), and held that an action for wrongful death based upon unseaworthiness is maintainable under general federal maritime law. *Moragne* itself did not fully define the new, nonstatutory, cause of action, and its contours were further shaped some four years later by *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974). *Gaudet* held, *inter alia*, that the maritime wrongful-death remedy created by *Moragne* encompassed the recovery of damages for loss of society by a decedent's widow. So, it is no longer correct to assume—as did *Igneri*—that the warranty of seaworthiness affords no relief to the spouse of a longshoreman. More importantly, *Gaudet* provides the conclusive decisional recognition of a

right to recover for loss of society that *Igneri* found lacking.

To be sure, *Gaudet* upheld a claim for loss of society in the context of a wrongful-death action. But general federal maritime law is a source of relief for a longshoreman's personal injury, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 412–414 (1953), just as it is a source of remedy for wrongful death, *Moragne, supra.* Within this single body of judge-formulated law, there is no apparent reason to differentiate between fatal and nonfatal injuries in authorizing the recovery of damages for loss of society. The vitality of the longshoreman is logically irrelevant once we have accepted the principle that injury suffered by a longshoreman's spouse from loss of society should be compensable, when proved. Nothing intrinsic to the *Gaudet* rule, therefore, should cabin its application to wrongful death.[8]

Petitioner argues that the reach of *Gaudet*'s principle must be limited by the fact that no right to recover for loss of society due to maritime injury has been recognized by Congress under § 2 of the Death on the High Seas Act (DOHSA), 46 U. S. C. § 762; see *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 620 (1978), or the Jones Act, 46 U. S. C. § 688. But it is a settled canon of maritime jurisprudence that " 'it better becomes the humane and liberal character of proceedings in

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[8] *Gaudet*'s discussion of the issue of double liability did state:

"[D]ecedent's recovery did not include damages for the dependents' loss of services or of society, and funeral expenses. Indeed, these losses—unique to the decedent's dependents—could not accrue until the decedent's death." 414 U. S., at 591–592.

In *Christofferson* v. *Halliburton Co.*, 534 F. 2d, at 1150, the Court of Appeals for the Fifth Circuit inferred from that passage an intention to limit *Gaudet* to the wrongful-death context. But no such limitation is implicit. As a matter of logic, *Gaudet*'s statement that double liability is precluded in wrongful-death cases is not equivalent to the proposition that *only* wrongful-death cases preclude double liability. Moreover, the *Gaudet* opinion itself noted that damages may be assessed for loss of society in personal injury cases, 414 U. S., at 589–590; see *Christofferson, supra*, at 1153–1154 (Freeman, J., dissenting).

admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" *Moragne* v. *States Marine Lines, supra,* at 387, quoting, with approval, *The Sea Gull,* 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865); accord, *Sea-Land Services, Inc.* v. *Gaudet, supra,* at 583. Plainly, neither statute embodies an "established and inflexible" rule here foreclosing recognition of a claim for loss of society by judicially crafted general maritime law.

DOHSA comprehends relief for *fatal* injuries incurred on the *high seas,* 46 U. S. C. § 761. To be sure, *Mobil Oil Corp.* v. *Higginbotham, supra,* construed DOHSA to forbid general maritime law supplementation of the elements of compensation for which the Act provides. But *Higginbotham* never intimated that the preclusive effect of DOHSA extends beyond the statute's ambit. To the contrary, while treating the statutory remedies for wrongful deaths on the high seas as exclusive, *Higginbotham* expressly reaffirmed that *Gaudet* governs recoveries for wrongful deaths on territorial waters. 436 U. S., at 623–625; see *Moragne, supra,* at 397–398. And if DOHSA does not pre-empt general maritime law where *fatalities* occur *within* territorial waters, it follows *a fortiori* that the Act does not exclude federal maritime law as a source of relief for *nonfatal* injuries upon the same waters.

Nor do we read the Jones Act as sweeping aside general maritime law remedies. Notwithstanding our sometime treatment of longshoremen as pseudo-seamen for certain Jones Act purposes, *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50 (1926); cf. *Seas Shipping Co.* v. *Sieracki, supra,* at 100–102,[9] the Jones Act does not exhaustively or exclu-

[9] *Haverty* was largely, if not completely, superseded by the Longshoremen's and Harbor Workers' Compensation Act of 1927, 33 U. S. C. § 901 *et seq.* See *Swanson* v. *Marra Bros.,* 328 U. S. 1 (1946). But see G. Gilmore & C. Black, The Law of Admiralty 330, 454–455 (2d ed. 1975). *Sieracki* has been overtaken by the 1972 Amendments to the Longshoremen's Act. See Gilmore & Black, *supra,* at 449.

sively regulate longshoremen's remedies, see *Moragne*, 398 U. S., at 395–396, and n. 12; *Pope & Talbot, Inc.* v. *Hawn*, *supra*, at 413–414; *Igneri*, 323 F. 2d, at 266.[10] Furthermore, the Jones Act lacks such preclusive effect even with respect to true seamen; thus, we have held that federal maritime law permits the dependents of seamen killed within territorial seas to recover for violation of a duty of seaworthiness that entails a stricter standard of care than the Jones Act. *Moragne*, *supra*, at 396, n. 12; see Gilmore & Black, *supra* n. 9, at 367–368.

Apart from the question of statutory pre-emption, the liability schemes incorporated in DOHSA and the Jones Act should not be accorded overwhelming analogical weight in formulating remedies under general maritime law. The two statutes were enacted within days to address related problems—yet they are "hopelessly inconsistent with each other." Gilmore & Black, *supra* n. 9, at 359; see *id.*, at 360–367. The Jones Act itself was not the product of careful drafting or attentive legislative review, *id.*, at 277, 327; assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, which was incorporated into the Jones Act, see, *e. g.*, *Ivy* v. *Security Barge Lines, Inc.*, 606 F. 2d 524, 526 (CA5 1979) (en banc), cert. pending, No. 79–1228. Thus, a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command

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[10] Respondent Joseph Vinal Ship Maintenance, Inc., the interests of which parallel petitioner's, has advanced the argument that recovery for loss of society is barred by the Longshoremen's and Harbor Workers' Compensation Act as applicable at the time of the injury—*i. e.*, before the 1972 Amendments. It does not appear that this contention was raised below; in any event, it has no merit. Whatever the limitations on recovery against employers under the pre-1972 LHWCA, longshoremen retained additional rights based upon the warranty of seaworthiness. See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); cf. *Sea-Land Services, Inc.* v. *Gaudet*, *supra*.

our adherence in analogous contexts. And we have already indicated that "no intention appears that the [Death on the High Seas] Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." *Moragne, supra,* at 400; *Gaudet,* 414 U. S., at 588, n. 22.

Far more persuasive at the present juncture are currently prevailing views about compensation for loss of society. Cf. *Sea-Land Services, Inc.* v. *Gaudet, supra,* at 587–588. As the Court of Appeals observed in *Igneri:*

> "At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so. . . ." 323 F. 2d, at 260.

At the time *Igneri* was decided, governing law in the relevant jurisdictions was substantially divided over the wife's right to recover for loss of consortium. *Id.,* at 260–264. But the state of the law is very different today. Currently, a clear majority of States permit a wife to recover damages for loss of consortium from personal injury to her husband.[11] Fur-

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[11] Forty-one States and the District of Columbia allow recovery by a wife or couple: *Swartz* v. *United States Steel Corp.,* 293 Ala. 439, 304 So. 2d 881 (1974); *Schreiner* v. *Fruit,* 519 P. 2d 462 (Alaska 1974); *Glendale* v. *Bradshaw,* 108 Ariz. 582, 503 P. 2d 803 (1972); *Missouri Pacific Transp. Co.* v. *Miller,* 227 Ark. 351, 299 S. W. 2d 41 (1957); *Rodriguez* v. *Bethlehem Steel Corp.,* 12 Cal. 3d 382, 525 P. 2d 669 (1974); Colo. Rev. Stat. § 14–2–209 (1973); *Hopson* v. *St. Mary's Hospital,* 176 Conn. 485, 408 A. 2d 260 (1979); *Yonner* v. *Adams,* 53 Del. 229, 167 A. 2d 717 (1961); *Hitaffer* v. *Argonne Co.,* 87 U. S. App. D. C. 57, 183 F. 2d 811 (1950); *Gates* v. *Foley,* 247 So. 2d 40 (Fla. 1971); *Brown* v. *Georgia-Tennessee Coaches, Inc.,* 88 Ga. App. 519, 77 S. E. 2d 24 (1953); *Nishi* v. *Hartwell,* 52 Haw. 188, 473 P. 2d 116 (1970); *Nichols* v. *Sonneman,* 91 Idaho 199, 418 P. 2d 562 (1966); *Dini* v. *Naiditch,* 20 Ill. 2d 406, 170 N. E. 2d 881 (1960); *Troue* v. *Marker,* 253 Ind. 284, 252 N. E. 2d 800 (1969); *Acuff* v. *Schmit,* 248 Iowa 272, 78 N. W. 2d 480 (1956); Kan. Stat. Ann. § 23–205 (Supp. 1979); *Kotsiris* v. *Ling,* 451 S. W. 2d

thermore, even in *Igneri*'s day, the generally accepted rule allowed a *husband* to gain damages for loss of consortium with his tortiously injured *wife*, *id.*, at 260; so "clearly authorized" a common-law principle would have been translated into maritime law by the *Igneri* analysis, *id.*, at 260, 267. And if *Igneri* implies that a husband may collect compensation under maritime law for loss of consortium with his injured wife, it follows that the same relief is due the wife who suffers a comparable loss because of wounds suffered by her husband, see, *e. g.*, *Duncan* v. *General Motors Corp.*, 499 F. 2d 835 (CA10 1974); cf. *Orr* v. *Orr*, 440 U. S. 268 (1979).

Admiralty jurisprudence has always been inspirited with a "special solicitude for the welfare of those men who under[take] to venture upon hazardous and unpredictable sea voyages." *Moragne* v. *States Marine Lines*, *supra*, at 387. As in *Moragne* and *Gaudet*, "[o]ur approach to the

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411 (Ky. 1970); Me. Rev. Stat. Ann., Tit. 19, § 167–A (Supp. 1979); *Deems* v. *Western Maryland R. Co.*, 247 Md. 95, 231 A. 2d 514 (1967); *Diaz* v. *Eli Lilly & Co.*, 364 Mass. 153, 302 N. E. 2d 555 (1973); *Montgomery* v. *Stephan*, 359 Mich. 33, 101 N. W. 2d 227 (1960); *Thill* v. *Modern Erecting Co.*, 284 Minn. 508, 170 N. W. 2d 865 (1969); Miss. Code Ann. § 93–3–1 (1972); *Novak* v. *Kansas City Transit, Inc.*, 365 S. W. 2d 539 (Mo. 1963); *Duffy* v. *Lipsman-Fulkerson & Co.*, 200 F. Supp. 71 (Mont. 1961) (applying Montana law); *Luther* v. *Maple*, 250 F. 2d 916 (CA8 1958) (applying Nebraska law) (semble); *General Electric Co.* v. *Bush*, 88 Nev. 360, 498 P. 2d 366 (1972); N. H. Rev. Stat. Ann. § 507:8–a (1968); *Ekalo* v. *Constructive Serv. Corp.*, 46 N. J. 82, 215 A. 2d 1 (1965); *Millington* v. *Southeastern Elevator Co.*, 22 N. Y. 2d 498, 239 N. E. 2d 897 (1968); *Clouston* v. *Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St. 2d 65, 258 N. E. 2d 230 (1970); Okla. Stat., Tit. 32, § 15 (Supp. 1979); Ore. Rev. Stat. § 108.010 (1975); *Hopkins* v. *Blanco*, 457 Pa. 90, 320 A. 2d 139 (1974); *Mariani* v. *Nanni*, 95 R. I. 153, 185 A. 2d 119 (1962); *Hoekstra* v. *Helgeland*, 78 S. D. 82, 98 N. W. 2d 669 (1959); Tenn. Code Ann. § 25–109 (Supp. 1979); *Whittlesey* v. *Miller*, 572 S. W. 2d 665 (Tex. 1978); Vt. Stat. Ann., Tit. 12, § 5431 (Supp. 1979); W. Va. Code § 48–3–19a (1976); *Moran* v. *Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N. W. 2d 137 (1967). See also *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S., at 587; see generally W. Prosser, Law of Torts 895–896 (4th ed. 1971).

resolution of the issue before us . . . [is] consistent with the extension of this 'special solicitude' to the dependents of [seafarers]. . . ." *Gaudet, supra,* at 577. The decision of the New York Court of Appeals is

Affirmed.

THE CHIEF JUSTICE concurs in the judgment.

MR. JUSTICE POWELL, concurring in the judgment.

I continue to believe that *Sea-Land Services, Inc.* v. *Gaudet,* 414 U. S. 573, 595 (1974) (POWELL, J., dissenting), was decided wrongly, but I recognize the utility of *stare decisis* in cases of this kind, *id.,* at 596. Since I see no rational basis for drawing a distinction between fatal and nonfatal injuries, I join in the judgment of the Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

After certiorari has been granted, and a case has been briefed and argued, there is an inevitable pressure to decide it, especially when the argument for a dismissal is based on the seemingly technical requirements of finality. In this case, however, it is plain to me that the decision below is not final, and that the Court is therefore without jurisdiction to review it under 28 U. S. C. § 1257.

Respondent Gilberto Alvez brought suit against petitioner in the New York Supreme Court for injuries incurred during the course of his employment on petitioner's vessel. He moved to amend the complaint to add his spouse, Juanita Alvez, as a plaintiff. His motion was denied. The Appellate Division of the New York Supreme Court reversed, and the New York Court of Appeals affirmed the decision of the Appellate Division. This Court granted certiorari to review the decision of the New York Court of Appeals.

After certiorari had been granted, and while the case was being briefed in this Court, the litigants proceeded to try the

case in the New York Supreme Court. Two weeks before the case was argued here, Gilberto Alvez received a jury verdict against petitioner in the sum of $500,000, and Juanita Alvez received $50,000. In oral argument before this Court, counsel for petitioner indicated that petitioner is appealing the judgment on grounds of improper jury instructions.[1] If petitioner's appeal is successful, it seems plain that both verdicts will be reversed.

In these circumstances, I am unable to accept the Court's conclusion that the decision below is final. Nothing in the record before us supports the suggestion that " 'the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.' " *Ante*, at 279, quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 480 (1975). The federal issue may neither survive nor require decision if peti-

[1] In oral argument counsel for petitioner stated that the Appellate Division may "reverse on . . . instructions to the jury. . . ." Tr. of Oral Arg. 10. I see no basis for the suggestion that "petitioner's appeal from the trial verdict against it will not challenge that element of the verdict which awarded damages for loss of society to Mrs. Alvez." *Ante*, at 277–278. In context it seems plain that counsel's comments on the award to Juanita Alvez were designed to indicate that there was no *separate* appeal with respect to the award on her behalf. But there was no suggestion that petitioner is not challenging the determination of liability as to Mr. Alvez, from whose award his spouse's is wholly derivative. The assertion that Juanita Alvez' award is final is contradicted by the suggestion of counsel for respondent Alvez that "if there is a problem," the parties might "[w]aive any right to appeal as far as the decision, as far as the judgment for Juanita Alvez is concerned below." Tr. of Oral Arg. 20. Counsel conceded that, in the absence of such a waiver, "there is always the possibility that the defendant in this case might find some grounds for error in the record." *Id.*, at 21. The offer of a waiver of appellate rights and the concession that "some grounds for error" might be found are difficult to reconcile with the suggestion that further state-court proceedings cannot affect the award to Juanita Alvez. At the very least, the comments of counsel are highly ambiguous, and it seems odd for the plurality to indulge in very possibly incorrect speculations on the point when jurisdictional prerequisites are at stake.

tioner is successful in future state-court proceedings. Therefore, the finality requirement of § 1257 precludes us from deciding the case. Cf. *Southern Pacific Co.* v. *Gileo*, 351 U. S. 493 (1956); *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948).

Even if I were to accept the unfounded premise that the federal issue will necessarily survive, I would not agree that the order of the New York Court of Appeals was rendered final by developments subsequent to the grant of certiorari. The plurality apparently concedes that when we granted certiorari, the New York Court of Appeals' order allowing leave to amend was not appealable. *Ante*, at 277. After that order was entered, the procedural posture of the case was the same as if the trial court had granted leave to amend in the first place. Such an order would not, of course, have been final; in the plurality's own words, it "was only the predicate to a decision on the merits of the claim for loss of society." *Ibid.* If this reasoning is correct, I do not believe that a subsequent trial—conducted *after we have granted certiorari*—can vest jurisdiction in this Court. I have been unable to find any case, and the plurality points to none, that supports the apparent adoption of a contrary rule. Indeed, our cases appear uniformly to assume that finality is determined as of the time that certiorari is sought. See *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942).[2]

For three reasons, the plurality's conclusion to the contrary strikes me as fundamentally misguided. First, it sanctions the practice of granting certiorari to review nonfinal orders, and thus treats the finality requirement as merely a policy to be considered in deciding whether we should resolve a dis-

[2] On occasion, of course, subsequent events can *deprive* the Court of jurisdiction over a case, as for example by rendering it moot. For reasons discussed in the text, however, I see no justification, either in precedent or in principle, for the view that subsequent events can justify a grant of certiorari to review a decision over which the Court had no jurisdiction in the first instance.

pute. The finality requirement, of course, is no such thing; it determines whether we have the power to render a decision. Jurisdictional prerequisites cannot be disregarded simply because it seems more economical for the Court to decide the case. Second, it encourages litigants to seek review of nonfinal judgments in the hope that subsequent events will render them final. Such a practice only retards the speedy resolution of disputes and multiplies the burdens of litigation. Finally, and most disturbing, today's decision encourages litigants and lower courts to proceed to try a case in which this Court has granted certiorari and which is simultaneously being briefed and argued in this Court. That result cannot easily coexist with one of the basic principles on which our judicial system is premised, that two courts cannot have jurisdiction over the same case at the same time. See 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice § 203.11 (1975), and cases cited. The necessity for adhering to that rule in these circumstances is plainly suggested by the waste of judicial resources that would result if the Court decided to reverse the Court of Appeals and thus to render the trial court proceedings with respect to Juanita Alvez a complete nullity.

It should always be remembered that the "considerations that determine finality . . . have reference to very real interests—not merely those of the immediate parties but, more particularly, those that pertain to the smooth functioning of our judicial system." *Republic Natural Gas Co.* v. *Oklahoma, supra,* at 69. Accordingly, the Court's salutary adoption of a "practical rather than a technical construction" of the finality requirement, *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949), is not a license for ignoring the requirement entirely, or for interpreting it without regard for its legitimate underlying purposes. The finality requirement "serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in

the sense of Art. III; (3) it limits review of state court determinations of federal . . . issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Bd.* v. *Snyder's Stores*, 414 U. S. 156, 159 (1973). See also *Republic Natural Gas Co.* v. *Oklahoma*, *supra*; *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 123–124 (1945). All of these purposes may be jeopardized by the decision today. We can have no assurance that there are not other federal issues in the case that will reach the Court at some point in the future. The decision the Court announces may be entirely advisory if the appellate courts in New York rule in favor of the petitioner. And principles of federalism counsel against reviewing the decision of the New York courts prematurely and without any necessity for doing so.

In my view, the proper disposition in these circumstances would be to dismiss the writ of certiorari as improvidently granted, and to permit the state courts to resolve the pending appeal. If the federal question still survives after the judgment of the highest state court becomes final, petitioner may again seek a writ of certiorari to review that judgment. I dissent.

Syllabus

RHODE ISLAND *v.* INNIS

CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

No. 78–1076. Argued October 30, 1979—Decided May 12, 1980

Shortly after a taxicab driver, who had been robbed by a man wielding a sawed-off shotgun, identified a picture of respondent as that of his assailant, a Providence, R. I., patrolman spotted respondent, who was unarmed, on the street, arrested him, and advised him of his rights under *Miranda* v. *Arizona*, 384 U. S. 436. When other police officers arrived at the arrest scene, respondent was twice again advised of his *Miranda* rights, and he stated that he understood his rights and wanted to speak with a lawyer. Respondent was then placed in a police car to be driven to the central station in the company of three officers, who were instructed not to question respondent or intimidate him in any way. While en route to the station, two of the officers engaged in a conversation between themselves concerning the missing shotgun. One of the officers stated that there were "a lot of handicapped children running around in this area" because a school for such children was located nearby, and "God forbid one of them might find a weapon with shells and they might hurt themselves." Respondent interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. Upon returning to the scene of the arrest where a search for the shotgun was in progress, respondent was again advised of his *Miranda* rights, replied that he understood those rights but that he "wanted to get the gun out of the way because of the kids in the area in the school," and then led the police to the shotgun. Before trial on charges of kidnaping, robbery, and murder of another taxicab driver, the trial court denied respondent's motion to suppress the shotgun and the statements he had made to the police regarding its discovery, ruling that respondent had waived his *Miranda* rights, and respondent was subsequently convicted. The Rhode Island Supreme Court set aside the conviction and held that respondent was entitled to a new trial, concluding that respondent had invoked his *Miranda* right to counsel and that, contrary to *Miranda*'s mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" respondent without a valid waiver of his right to counsel.

Held: Respondent was not "interrogated" in violation of his right under *Miranda* to remain silent until he had consulted with a lawyer. Pp. 297–303.

(a) The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. Pp. 298–302.

(b) Here, there was no express questioning of respondent; the conversation between the two officers was, at least in form, nothing more than a dialogue between them to which no response from respondent was invited. Moreover, respondent was not subjected to the "functional equivalent" of questioning, since it cannot be said that the officers should have known that their conversation was reasonably likely to elicit an incriminating response from respondent. There is nothing in the record to suggest that the officers were aware that respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children, or that the police knew that respondent was unusually disoriented or upset at the time of his arrest. Nor does the record indicate that, in the context of a brief conversation, the officers should have known that respondent would suddenly be moved to make a self-incriminating response. While it may be said that respondent was subjected to "subtle compulsion," it must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response, which was not established here. Pp. 302–303.

120 R. I. —, 391 A. 2d 1158, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 304. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 304. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 305. STEVENS, J., filed a dissenting opinion, *post*, p. 307.

Dennis J. Roberts II, Attorney General of Rhode Island, argued the cause for petitioner. With him on the briefs were *Nancy Marks Rahmes* and *Stephen Lichatin III*, Special Assistant Attorneys General.

John A. MacFadyen III argued the cause for respondent. With him on the brief was *William F. Reilly.**

MR. JUSTICE STEWART delivered the opinion of the Court.

In *Miranda* v. *Arizona*, 384 U. S. 436, 474, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue in this case is whether the respondent was "interrogated" in violation of the standards promulgated in the *Miranda* opinion.

I

On the night of January 12, 1975, John Mulvaney, a Providence, R. I., taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later buried in a shallow grave in Coventry, R. I. He had died from a shotgun blast aimed at the back of his head.

On January 17, 1975, shortly after midnight, the Providence police received a telephone call from Gerald Aubin, also a taxicab driver, who reported that he had just been robbed by a man wielding a sawed-off shotgun. Aubin further reported that he had dropped off his assailant near Rhode Island College in a section of Providence known as Mount Pleasant. While at the Providence police station waiting to give a statement, Aubin noticed a picture of his assailant on a bulletin board. Aubin so informed one of the police officers present. The officer prepared a photo array, and again Aubin identified a picture of the same person. That person was the respondent. Shortly thereafter, the Providence police began a search of the Mount Pleasant area.

At approximately 4:30 a. m. on the same date, Patrolman Lovell, while cruising the streets of Mount Pleasant in a pa-

*Briefs of *amici curiae* were filed by *George Deukmejian*, Attorney General, *Robert H. Philibosian*, Chief Assistant Attorney General, and *William E. James*, Senior Assistant Attorney General, for the State of California; and by *Fred Okrand* and *Mark D. Rosenbaum* for the ACLU Foundation of Southern California et al.

trol car, spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called *Miranda* rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter's request for a cigarette.

Within minutes, Sergeant Sears arrived at the scene of the arrest, and he also gave the respondent the *Miranda* warnings. Immediately thereafter, Captain Leyden and other police officers arrived. Captain Leyden advised the respondent of his *Miranda* rights. The respondent stated that he understood those rights and wanted to speak with a lawyer. Captain Leyden then directed that the respondent be placed in a "caged wagon," a four-door police car with a wire screen mesh between the front and rear seats, and be driven to the central police station. Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun.[1] As Patrolman Gleckman later testified:

> "A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there's a lot of handicapped children running around in this area, and God

[1] Although there was conflicting testimony about the exact seating arrangements, it is clear that everyone in the vehicle heard the conversation.

> forbid one of them might find a weapon with shells and they might hurt themselves." App. 43–44.

Patrolman McKenna apparently shared his fellow officer's concern:

> "A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it." *Id.*, at 53.

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

> "A. He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself." *Id.*, at 59.

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. At this point, Patrolman McKenna radioed back to Captain Leyden that they were returning to the scene of the arrest, and that the respondent would inform them of the location of the gun. At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his *Miranda* rights. The respondent replied that he understood those rights but that he "wanted to get the gun out of the way because of the kids in the area in the school." The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by the side of the road.

On March 20, 1975, a grand jury returned an indictment charging the respondent with the kidnaping, robbery, and murder of John Mulvaney. Before trial, the respondent moved to suppress the shotgun and the statements he had

made to the police regarding it. After an evidentiary hearing at which the respondent elected not to testify, the trial judge found that the respondent had been "repeatedly and completely advised of his *Miranda* rights." He further found that it was "entirely understandable that [the officers in the police vehicle] would voice their concern [for the safety of the handicapped children] to each other." The judge then concluded that the respondent's decision to inform the police of the location of the shotgun was "a waiver, clearly, and on the basis of the evidence that I have heard, and [*sic*] intelligent waiver, of his [*Miranda*] right to remain silent." Thus, without passing on whether the police officers had in fact "interrogated" the respondent, the trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent's trial, and the jury returned a verdict of guilty on all counts.

On appeal, the Rhode Island Supreme Court, in a 3–2 decision, set aside the respondent's conviction. 120 R. I. —, 391 A. 2d 1158. Relying at least in part on this Court's decision in *Brewer* v. *Williams*, 430 U. S. 387, the court concluded that the respondent had invoked his *Miranda* right to counsel and that, contrary to *Miranda*'s mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had "interrogated" the respondent without a valid waiver of his right to counsel. It was the view of the state appellate court that, even though the police officers may have been genuinely concerned about the public safety and even though the respondent had not been addressed personally by the police officers, the respondent nonetheless had been subjected to "subtle coercion" that was the equivalent of "interrogation" within the meaning of the *Miranda* opinion. Moreover, contrary to the holding of the trial court, the appellate court concluded that the evidence was insufficient to support a finding of waiver. Having

concluded that both the shotgun and testimony relating to its discovery were obtained in violation of the *Miranda* standards and therefore should not have been admitted into evidence, the Rhode Island Supreme Court held that the respondent was entitled to a new trial.

We granted certiorari to address for the first time the meaning of "interrogation" under *Miranda* v. *Arizona*. 440 U. S. 934.

II

In its *Miranda* opinion, the Court concluded that in the context of "custodial interrogation" certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. More specifically, the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U. S., at 444. Those safeguards included the now familiar *Miranda* warnings—namely, that the defendant be informed "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires"—or their equivalent. *Id.*, at 479.

The Court in the *Miranda* opinion also outlined in some detail the consequences that would result if a defendant sought to invoke those procedural safeguards. With regard to the right to the presence of counsel, the Court noted:

> "Once warnings have been given, the subsequent procedure is clear. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to

> have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 473–474.

In the present case, the parties are in agreement that the respondent was fully informed of his *Miranda* rights and that he invoked his *Miranda* right to counsel when he told Captain Leyden that he wished to consult with a lawyer. It is also uncontested that the respondent was "in custody" while being transported to the police station.

The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer.[2] In resolving this issue, we first define the term "interrogation" under *Miranda* before turning to a consideration of the facts of this case.

A

The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 444 (emphasis added). This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.

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[2] Since we conclude that the respondent was not "interrogated" for *Miranda* purposes, we do not reach the question whether the respondent waived his right under *Miranda* to be free from interrogation until counsel was present.

We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. *Id.*, at 457–458. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. *Id.*, at 453. A variation on this theme discussed in *Miranda* was the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. *Ibid.* The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." *Id.*, at 450. It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.[3]

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily with-

[3] To limit the ambit of *Miranda* to express questioning would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*." *Commonwealth* v. *Hamilton*, 445 Pa. 292, 297, 285 A. 2d 172, 175.

> out any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, at 478 (emphasis added).

It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.[4]

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express

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[4] There is language in the opinion of the Rhode Island Supreme Court in this case suggesting that the definition of "interrogation" under *Miranda* is informed by this Court's decision in *Brewer* v. *Williams*, 430 U. S. 387. 120 R. I. —, —, 391 A. 2d 1158, 1161–1162. This suggestion is erroneous. Our decision in *Brewer* rested solely on the Sixth and Fourteenth Amendment right to counsel. 430 U. S., at 397–399. That right, as we held in *Massiah* v. *United States*, 377 U. S. 201, 206, prohibits law enforcement officers from "deliberately elicit[ing]" incriminating information from a defendant in the absence of counsel after a formal charge against the defendant has been filed. Custody in such a case is not controlling; indeed, the petitioner in *Massiah* was not in custody. By contrast, the right to counsel at issue in the present case is based not on the Sixth and Fourteenth Amendments, but rather on the Fifth and Fourteenth Amendments as interpreted in the *Miranda* opinion. The definitions of "interrogation" under the Fifth and Sixth Amendments, if indeed the term "interrogation" is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct. See Kamisar, *Brewer v. Williams, Massiah,* and *Miranda:* What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 41–55 (1978).

questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response [5] from the suspect.[6] The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.[7] But, since the police surely

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[5] By "incriminating response" we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial. As the Court observed in *Miranda:*

"No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." 384 U. S., at 476–477.

[6] One of the dissenting opinions seems totally to misapprehend this definition in suggesting that it "will almost certainly exclude every statement [of the police] that is not punctuated with a question mark." *Post,* at 312.

[7] This is not to say that the intent of the police is irrelevant, for it

cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.[8]

B

Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of *Miranda*. It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the

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may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

[8] Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect.

record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.[9]

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

The Rhode Island Supreme Court erred, in short, in equating "subtle compulsion" with interrogation. That the officers' comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to "subtle compulsion." But that is not the end of the inquiry. It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response.[10] This was not established in the present case.

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[9] The record in no way suggests that the officers' remarks were *designed* to elicit a response. See n. 7, *supra*. It is significant that the trial judge, after hearing the officers' testimony, concluded that it was "entirely understandable that [the officers] would voice their concern [for the safety of the handicapped children] to each other."

[10] By way of example, if the police had done no more than to drive past the site of the concealed weapon while taking the most direct route to the police station, and if the respondent, upon noticing for the first time

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

I would prefer to reverse the judgment for the reasons stated in my dissenting opinion in *Brewer* v. *Williams*, 430 U. S. 387 (1977); but given that judgment and the Court's opinion in *Brewer*, I join the opinion of the Court in the present case.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

Since the result is not inconsistent with *Miranda* v. *Arizona*, 384 U. S. 436 (1966), I concur in the judgment.

The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date. I fear, however, that the rationale in Parts II–A and II–B of the Court's opinion will not clarify the tension between this holding and *Brewer* v. *Williams*, 430 U. S. 387 (1977), and our other cases. It may introduce new elements of uncertainty; under the Court's test, a police officer, in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused. See, *e. g.*, *ante*, at 302, n. 8. Few, if any, police officers are competent to make the kind of evaluation seemingly contemplated; even a psychiatrist asked to express an expert opinion on these aspects of a suspect in custody would very likely employ extensive questioning and observation to make the judgment now charged to police officers.

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the proximity of the school for handicapped children, had blurted out that he would show the officers where the gun was located, it could not seriously be argued that this "subtle compulsion" would have constituted "interrogation" within the meaning of the *Miranda* opinion.

Trial judges have enough difficulty discerning the boundaries and nuances flowing from post-*Miranda* opinions, and we do not clarify that situation today.*

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I am substantially in agreement with the Court's definition of "interrogation" within the meaning of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In my view, the *Miranda* safeguards apply whenever police conduct is intended or likely to produce a response from a suspect in custody. As I read the Court's opinion, its definition of "interrogation" for *Miranda* purposes is equivalent, for practical purposes, to my formulation, since it contemplates that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Ante*, at 302, n. 7. Thus, the Court requires an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know.

I am utterly at a loss, however, to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation. Innis was arrested at 4:30 a. m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car. Within a short time he had been twice more advised of his rights and driven away in a four-door sedan with three police officers. Two officers sat in the front seat and one sat beside Innis in the back seat. Since the car traveled no more than a mile before Innis agreed to point out the location of

*That we may well be adding to the confusion is suggested by the problem dealt with in *California* v. *Braeseke*, 444 U. S. 1309 (1980) (REHNQUIST, J., in chambers) (difficulty of determining whether a defendant has waived his *Miranda* rights), and cases cited therein.

the murder weapon, Officer Gleckman must have begun almost immediately to talk about the search for the shotgun.

The Court attempts to characterize Gleckman's statements as "no more than a few offhand remarks" which could not reasonably have been expected to elicit a response. *Ante*, at 303. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the "talking back and forth" between Gleckman and McKenna was that they had to find the shotgun to avert a child's death.

One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique. See, *e. g.*, F. Inbau & J. Reid, Criminal Interrogation and Confessions 60–62 (2d ed. 1967).

Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect,* traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge

*Gleckman may even have been sitting in the back seat beside respondent. See App. 50, 52, 56; but see *id.*, 39, 43, 47, 58.

of and responsibility for the pressures to speak which they created.

I firmly believe that this case is simply an aberration, and that in future cases the Court will apply the standard adopted today in accordance with its plain meaning.

MR. JUSTICE STEVENS, dissenting.

An original definition of an old term coupled with an original finding of fact on a cold record makes it possible for this Court to vacate the judgment of the Supreme Court of Rhode Island. That court, on the basis of the facts in the record before it, concluded that members of the Providence, R. I., police force had interrogated respondent, who was clearly in custody at the time, in the absence of counsel after he had requested counsel. In my opinion the state court's conclusion that there was interrogation rests on a proper interpretation of both the facts and the law; thus, its determination that the products of the interrogation were inadmissible at trial should be affirmed.

The undisputed facts can be briefly summarized. Based on information that respondent, armed with a sawed-off shotgun, had just robbed a cabdriver in the vicinity of Rhode Island College, a number of Providence police officers began a thorough search of the area in the early morning of January 17, 1975. One of them arrested respondent without any difficulty at about 4:30 a. m. Respondent did not then have the shotgun in his possession and presumably had abandoned it, or hidden it, shortly before he was arrested. Within a few minutes, at least a dozen officers were on the scene. App. 37. It is fair to infer that an immediate search for the missing weapon was a matter of primary importance.

When a police captain arrived, he repeated the *Miranda* warnings that a patrolman and a sergeant had already given to respondent, and respondent said he wanted an attorney. The captain then ordered two officers who were assigned to

a "caged wagon" to transport respondent to the central station, and ordered a third officer to ride in the back seat with respondent. While the wagon was en route to the station, one of the officers, Officer Gleckman, stated that there was a school for handicapped children in the vicinity and "God forbid" one of them should find the shotgun and hurt herself.[1] As a result of this statement, respondent told the officers that he was willing to show them where the gun was hidden.[2] The wagon returned to the scene and respondent helped the officers locate the gun.

After a suppression hearing, the trial court assumed, without deciding, that Officer Gleckman's statement constituted interrogation. The court nevertheless allowed the shotgun and testimony concerning respondent's connection to it into evidence on the ground that respondent had waived his *Miranda* rights when he consented to help police locate the gun. On appeal from respondent's conviction for kidnaping, robbery and murder, the Rhode Island Supreme Court held that Officer Gleckman's statement constituted impermissible interrogation and rejected the trial court's waiver analysis. It therefore reversed respondent's conviction and remanded for a new trial. Today, the Court reverses the Rhode Island court's resolution of the interrogation issue, creating a new definition of that term and holding, as a matter of law, that the statement at issue in this case did not constitute interrogation.

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[1] Although the testimony is not entirely clear as to the exact wording of Officer Gleckman's statement, it appears that he talked about the possible danger being to a little girl. App. 59.

[2] After he returned to the scene, respondent told the police captain that he wanted to help them locate the shotgun because he "wanted to get the gun out of the way because of the kids in the area in the school." *Id.*, at 39. Given the timing of respondent's statement and the absence of any evidence that he knew about the school prior to Officer Gleckman's statement, it is clear that respondent's statement was the direct product of the conversation in the police wagon.

I

As the Court recognizes, *Miranda* v. *Arizona*, 384 U. S. 436, makes it clear that, once respondent requested an attorney, he had an absolute right to have any type of interrogation cease until an attorney was present.[3] As it also recognizes, *Miranda* requires that the term "interrogation" be broadly construed to include "either express questioning or its functional equivalent." *Ante*, at 300–301.[4] In my view any statement that would normally be understood by the average listener as calling for a response is the functional equivalent of a direct question, whether or not it is punctuated by a question mark. The Court, however, takes a much narrower view. It holds that police conduct is not the "functional equivalent" of direct questioning unless the police should have known that what they were saying or doing was likely to elicit an incriminating response from the suspect.[5] This holding represents a plain departure from the principles set forth in *Miranda*.

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[3] *Ante*, at 293, 297–298. In *Miranda* the Court explicitly stated: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U. S., at 474.

[4] As the Court points out, *ante*, at 299, the Court in *Miranda* was acutely aware of the fact that police interrogation techniques are not limited to direct questioning.

[5] "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Ante*, at 301.

In limiting its test to police statements "likely to elicit an incriminating response," the Court confuses the scope of the exclusionary rule with the definition of "interrogation." Of course, any incriminating statement as defined in *Miranda*, quoted *ante*, at 301, n. 5, must be excluded from evidence if it is the product of impermissible interrogation. But I fail to see how this rule helps in deciding whether a particular statement or tactic constitutes "interrogation." After all, *Miranda* protects a suspect in Innis' position not simply from interrogation that is likely to be successful, but from any interrogation at all.

In *Miranda* the Court required the now-familiar warnings to be given to suspects prior to custodial interrogation in order to dispel the atmosphere of coercion that necessarily accompanies such interrogations. In order to perform that function effectively, the warnings must be viewed by both the police and the suspect as a correct and binding statement of their respective rights.[6] Thus, if, after being told that he has a right to have an attorney present during interrogation, a suspect chooses to cut off questioning until counsel can be obtained, his choice must be "scrupulously honored" by the police. See *Michigan* v. *Mosley*, 423 U. S. 96, 104; *id.*, at 110, n. 2 (WHITE, J., concurring in result). At the least this must mean that the police are prohibited from making deliberate attempts to elicit statements from the suspect.[7] Yet the Court is unwilling to characterize all such attempts as "interrogation," noting only that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police

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[6] "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U. S., at 467.

[7] In *Brewer* v. *Williams*, 430 U. S. 387, 398–399, the Court applied the "deliberately elicited" standard in determining that statements were extracted from Williams in violation of his Sixth Amendment right to counsel. Although this case involves Fifth Amendment rights and the *Miranda* rules designed to safeguard those rights, respondent's invocation of his right to counsel makes the two cases indistinguishable. In both cases the police had an unqualified obligation to refrain from trying to elicit a response from the suspect in the absence of his attorney. See Kamisar, *Brewer v. Williams, Massiah,* and *Miranda:* What is "Interrogation"? When Does it Matter?, 67 Geo. L. J. 1, 73 (1978).

should have known was reasonably likely to have that effect." [8] *Ante*, at 302, n. 7.

From the suspect's point of view, the effectiveness of the warnings depends on whether it appears that the police are scrupulously honoring his rights. Apparent attempts to elicit information from a suspect after he has invoked his right to cut off questioning necessarily demean that right and tend to reinstate the imbalance between police and suspect that the *Miranda* warnings are designed to correct.[9] Thus, if the rationale for requiring those warnings in the first place is to be respected, any police conduct or statements that would appear to a reasonable person in the suspect's position to call for a response must be considered "interrogation." [10]

In short, in order to give full protection to a suspect's right to be free from any interrogation at all, the definition of "interrogation" must include any police statement or conduct that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation. By prohibiting only those relatively few statements or actions that a police officer should know are likely to elicit an incriminating response, the Court today accords a suspect

[8] This factual assumption is extremely dubious. I would assume that police often interrogate suspects without any reason to believe that their efforts are likely to be successful in the hope that a statement will nevertheless be forthcoming.

[9] See White, Police Trickery in Inducing Confessions, 127 U. Pa. L. Rev. 581, 609–611 (1979). As MR. JUSTICE WHITE pointed out in his opinion concurring in the result in *Michigan* v. *Mosley*, 423 U. S. 96, when a suspect invokes his right to an attorney, he is expressing "his own view that he is not competent to deal with the authorities without legal advice." *Id.*, at 110, n. 2. Under these circumstances, continued interrogation is likely to produce the same type of coercive atmosphere that the *Miranda* warnings are supposed to dispel.

[10] I would use an objective standard both to avoid the difficulties of proof inherent in a subjective standard and to give police adequate guidance in their dealings with suspects who have requested counsel.

considerably less protection. Indeed, since I suppose most suspects are unlikely to incriminate themselves even when questioned directly, this new definition will almost certainly exclude every statement that is not punctuated with a question mark from the concept of "interrogation." [11]

The difference between the approach required by a faithful adherence to *Miranda* and the stinted test applied by the Court today can be illustrated by comparing three different ways in which Officer Gleckman could have communicated his fears about the possible dangers posed by the shotgun to handicapped children. He could have:

(1) directly asked Innis:

> Will you please tell me where the shotgun is so we can protect handicapped schoolchildren from danger?

(2) announced to the other officers in the wagon:

> If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.

or (3) stated to the other officers:

> It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.

In my opinion, all three of these statements should be considered interrogation because all three appear to be designed to elicit a response from anyone who in fact knew where the gun was located.[12] Under the Court's test, on the other hand,

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[11] The Court's suggestion, *ante*, at 301, n. 6, that I totally misapprehend the import of its definition is belied by its application of the new standard to the facts of this case.

[12] See White, *Rhode Island v. Innis:* The Significance of a Suspect's Assertion of His Right to Counsel, 17 Am. Crim. L. Rev. 53, 68 (1979), where the author proposes the same test and applies it to the facts of this case, stating:

"Under the proposed objective standard, the result is obvious. Since the conversation indicates a strong desire to know the location of the

the form of the statements would be critical. The third statement would not be interrogation because in the Court's view there was no reason for Officer Gleckman to believe that Innis was susceptible to this type of an implied appeal, *ante*, at 302; therefore, the statement would not be reasonably likely to elicit an incriminating response. Assuming that this is true, see *infra*, at 314–315, then it seems to me that the first two statements, which would be just as unlikely to elicit such a response, should also not be considered interrogation. But, because the first statement is clearly an express question, it *would* be considered interrogation under the Court's test. The second statement, although just as clearly a deliberate appeal to Innis to reveal the location of the gun, would presumably not be interrogation because (a) it was not in form a direct question and (b) it does not fit within the "reasonably likely to elicit an incriminating response" category that applies to indirect interrogation.

As this example illustrates, the Court's test creates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure,[13] the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And if, contrary to all reasonable expectations, the suspect makes an

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shotgun, any person with knowledge of the weapon's location would be likely to believe that the officers wanted him to disclose its location. Thus, a reasonable person in Innis's position would believe that the officers were seeking to solicit precisely the type of response that was given."

[13] As THE CHIEF JUSTICE points out in his concurring opinion, "[f]ew, if any, police officers are competent to make the kind of evaluation seemingly contemplated [by the Court's opinion]" except by close and careful observation. *Ante*, at 304. Under these circumstances, courts might well find themselves deferring to what appeared to be good-faith judgments on the part of the police.

incriminating statement, that statement can be used against him at trial. The Court thus turns *Miranda*'s unequivocal rule against any interrogation at all into a trap in which unwary suspects may be caught by police deception.

II

Even if the Court's new definition of the term "interrogation" provided a proper standard for deciding this case, I find it remarkable that the Court should undertake the initial task of applying its new standard to the facts of the present case. As noted above, the trial judge did not decide whether Officer Gleckman had interrogated respondent. Assuming, *arguendo*, that he had, the judge concluded that respondent had waived his request for counsel by offering to help find the gun. The Rhode Island Supreme Court disagreed on the waiver questions,[14] and expressly concluded that interrogation had occurred. Even if the Rhode Island court might have reached a different conclusion under the Court's new definition, I do not believe we should exclude it from participating in a review of the actions taken by the Providence police. Indeed, given the creation of a new standard of decision at this stage of the litigation, the proper procedure would be to remand to the trial court for findings on the basis of evidence directed at the new standard.

In any event, I think the Court is clearly wrong in holding, as a matter of law, that Officer Gleckman should not have realized that his statement was likely to elicit an incriminating

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[14] Like the Rhode Island Supreme Court, I think it takes more than a prisoner's answer to a question to waive his right not to have the question asked in the first place. See *Brewer* v. *Williams*, 430 U. S., at 404; *Michigan* v. *Mosley*, 423 U. S., at 110, n. 2 (WHITE, J., concurring in result) ("[T]he accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism"). See also *People* v. *Cunningham*, 49 N. Y. 2d 203, 210, 400 N. E. 2d 360, 364–365 (1980).

response. The Court implicitly assumes that, at least in the absence of a lengthy harangue, a criminal suspect will not be likely to respond to indirect appeals to his humanitarian impulses. It then goes on to state that the officers in this case had no reason to believe that respondent would be unusually susceptible to such appeals. *Ante*, at 302. Finally, although the significance of the officer's intentions is not clear under its objective test, the Court states in a footnote that the record "in no way suggests" that Officer Gleckman's remarks were designed to elicit a response. *Ante*, at 303, n. 9.

The Court's assumption that criminal suspects are not susceptible to appeals to conscience is directly contrary to the teachings of police interrogation manuals, which recommend appealing to a suspect's sense of morality as a standard and often successful interrogation technique.[15] Surely the practical experience embodied in such manuals should not be ignored in a case such as this in which the record is devoid of any evidence—one way or the other—as to the susceptibility of suspects in general or of Innis in particular.

Moreover, there is evidence in the record to support the view that Officer Gleckman's statement was intended to elicit a response from Innis. Officer Gleckman, who was not regularly assigned to the caged wagon, was directed by a police captain to ride with respondent to the police station. Although there is a dispute in the testimony, it appears that Gleckman may well have been riding in the back seat with Innis.[16] The record does not explain why, notwithstanding

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[15] See, *e. g.*, F. Inbau & J. Reid, Criminal Interrogation and Confessions 60–61 (2d ed. 1967). Under the heading "Urge the Subject to Tell the Truth for the Sake of His Own Conscience, Mental Relief, or Moral Well-being, as Well as 'for the Sake of Everybody Concerned,' and Also Because It Is 'the Only Decent and Honorable Thing to Do,'" the authors advise interrogators to "challenge . . . the offender to display some evidence of decency and honor" by appealing to his religious or moral sensibilities.

[16] Officer Gleckman testified that he was riding in the front seat with the driver. App. 46. However, Officer McKenna, who had also ridden

the fact that respondent was handcuffed, unarmed, and had offered no resistance when arrested by an officer acting alone, the captain ordered Officer Gleckman to ride with respondent.[17] It is not inconceivable that two professionally trained police officers concluded that a few well-chosen remarks might induce respondent to disclose the whereabouts of the shotgun.[18] This conclusion becomes even more plausible in light of the emotionally charged words chosen by Officer Gleckman ("God forbid" that a "little girl" should find the gun and hurt herself).[19]

III

Under my view of the correct standard, the judgment of the Rhode Island Supreme Court should be affirmed because the

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in the wagon, and the police captain both testified that Gleckman rode in the back seat with the suspect. *Id.*, at 50–52, 55–56, 38–39. Thereafter, the third officer in the wagon corroborated Gleckman's testimony. *Id.*, at 58.

[17] This was apparently a somewhat unusual procedure. Officer McKenna testified:

"If I remember correctly, the vehicle—Innis was placed in it and the vehicle door was closed, and we were waiting for instructions from Captain Leyden. . . . At that point, Captain Leyden instructed Patrolman Gleckman to accompany us. There's usually two men assigned to the wagon, but in this particular case he wanted a third man to accompany us, and Gleckman got in the rear seat. In other words, the door was closed. Gleckman opened the door and got in the vehicle with the subject. Myself, I went over to the other side and got in the passenger's side in the front." *Id.*, 55–56.

[18] Although Officer Gleckman testified that the captain told him not to interrogate, intimidate or coerce respondent on the way back, *id.*, at 46, this does not rule out the possibility that either or both of them thought an indirect psychological ploy would be permissible.

[19] In his article quoted in n. 12, *supra*, Professor White also points out that the officers were probably aware that the chances of a handicapped child's finding the weapon at a time when police were not present were relatively slim. Thus, he concluded that it was unlikely that the true purpose of the conversation was to voice a genuine concern over the children's welfare. See 17 Am. Crim. L. Rev., at 68.

statements made within Innis' hearing were as likely to elicit a response as a direct question. However, even if I were to agree with the Court's much narrower standard, I would disagree with its disposition of this particular case because the Rhode Island courts should be given an opportunity to apply the new standard to the facts of this case.

GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-488. Argued March 25, 26, 1980—Decided May 12, 1980

Section 706 (a) of Title VII of the Civil Rights Act of 1964 empowers the Equal Employment Opportunity Commission (EEOC) "to prevent any person from engaging in any unlawful practice" as set forth in Title VII. Section 706 (f)(1) authorizes the EEOC, after unlawful employment practice charges against a private employer are filed with it and it is unable to secure a conciliation agreement, to bring a civil action against the employer. And § 706 (g), in addition to providing for injunctive relief, provides for reinstatement or hiring of aggrieved employees with or without backpay. On the basis of sex discrimination charges filed by four employees of petitioner employer, the EEOC brought suit in Federal District Court under § 706 (f)(1), alleging discrimination against female employees in four States and seeking injunctive relief and backpay for the women affected by the challenged practices. The EEOC did not seek class certification pursuant to Federal Rule of Civil Procedure 23, and petitioner employer moved to dismiss the class action aspects of the complaint. The District Court denied the motion and the Court of Appeals, on interlocutory appeal, affirmed.

Held: The EEOC may seek classwide relief under § 706 (f)(1) without being certified as the class representative under Rule 23. Pp. 323–334.

(a) The language of §§ 706 (a), (f)(1), and (g) clearly authorizes the procedure that the EEOC followed in this case. Pp. 323–325.

(b) This understanding of the statute is supported by the purpose of the 1972 amendments to Title VII of securing more effective enforcement of Title VII by adding § 706 (f)(1) to authorize a civil enforcement suit by the EEOC as a supplement to the pre-existing private action. Under § 706 (f)(1), Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. The private-action rights under § 706 (f)(1) suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23. When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination. Pp. 325–326.

(c) Prior to 1972, the only civil actions authorized other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect "a pattern or practice" of discrimination, and such actions were brought in the name of the United States—not as a representative of the persons aggrieved—without obtaining certification under Rule 23 even though specific relief was awarded to individuals not parties to the suit. The 1972 amendments transferred the Attorney General's authority to bring "pattern or practice" suits to the EEOC, and Congress intended the EEOC to proceed in the same manner. Pp. 327–329.

(d) Forcing EEOC civil actions into the Rule 23 model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards as to numerosity, commonality, typicality, and adequacy of representation but seemingly authorized by § 706 (f)(1). The undesirability of doing either supports the conclusion that the procedural requirements of the Rule do not apply. Pp. 329–331.

(e) Departure from the statutory design is not warranted on the theory that Rule 23 should be invoked in order to secure a judgment in the EEOC's suit that will be binding upon all individuals with similar grievances in the class or subclasses that might be certified. It would not be consistent with the remedial purpose of the statutes to bind all "class" members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer, especially in view of the possible differences between the public and private interests involved. However, the courts are not powerless to prevent undue hardship to the defendant, and where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action. Pp. 332–333.

599 F. 2d 322, affirmed.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., filed a dissenting statement, *post*, p. 334.

James R. Dickens argued the cause for petitioners. With him on the briefs were *C. Lee Coulter* and *N. Huntley Holland.*

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief for the federal respond-

ent were *Solicitor General McCree, Leroy D. Clark, Joseph T. Eddins,* and *Lutz Alexander Prager. Herman L. Wacker* filed a memorandum for Local Union No. 89, International Brotherhood of Electrical Workers, respondent under this Court's Rule 21 (4).*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the Equal Employment Opportunity Commission (EEOC) may seek classwide relief under § 706 (f)(1) of Title VII of the Civil Rights Act of 1964 (Title VII) without being certified as the class representative under Rule 23 of the Federal Rules of Civil Procedure. The Court of Appeals for the Ninth Circuit held that certification was not required. 599 F. 2d 322 (1979). Because this is a recurring issue on which the federal courts are divided,[1] we granted certiorari, 444 U. S. 989 (1979). We affirm the judgment.

I

Four employees of General Telephone Company of the Northwest, Inc. (General Telephone), filed charges with the EEOC complaining of sex discrimination in employment. After investigation, the EEOC found reasonable cause to suspect discrimination against women, and in April 1977 brought suit in the United States District Court for the Western District of Washington under § 706 (f)(1) of Title VII, as amended, § 4, 86 Stat. 105, 42 U. S. C. § 2000e–5

**Avrum M. Goldberg, William R. Weissman, Robert E. Williams, Douglas S. McDowell,* and *Philip Elman* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Barry L. Goldstein and *Jack Greenberg* filed a brief for the N. A. A. C. P. Legal Defense and Educational Fund, Inc., as *amicus curiae* urging affirmance.

[1] The Fifth Circuit previously addressed this same issue and held that certification was required. *EEOC* v. *D. H. Holmes Co., Ltd.,* 556 F. 2d 787 (1977), cert. denied, 436 U. S. 962 (1978). The District Courts have decided the issue both ways.

(f)(1).[2] The EEOC named as defendants General Telephone and its subsidiary, West Coast Telephone Company of California, Inc. (hereinafter collectively referred to as General Telephone), as well as the certified bargaining agent, Local Union No. 89, International Brotherhood of Electrical Workers. The complaint alleged discrimination against female employees in General Telephone's facilities in the States of California, Idaho, Montana, and Oregon, in the form of restrictions on maternity leave, access to craft jobs, and promotion to managerial positions; it sought injunctive relief and backpay for the women affected by the challenged practices.

The complaint did not mention Federal Rule of Civil Procedure 23,[3] and the EEOC did not seek class certification pur-

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[2] Section 706 (f)(1) provides in pertinent part:

"If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

[3] Rule 23 provides in pertinent part:

"(a) Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact com-

suant to that Rule. In August 1977, the EEOC moved pursuant to Federal Rule of Civil Procedure 42 (b) "for an order bifurcating the issue of class liability from the issue of individual damages." The District Court referred the motion to a Magistrate, see Title VII, § 706 (f)(5), and General Telephone moved "for an order dismissing the class action aspects" of the complaint.[4]

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mon to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[4] Local Union No. 89, International Brotherhood of Electrical Workers, did not join in this motion. Discussions were underway between the union and the EEOC to resolve the allegations in the complaint against the

The Magistrate concluded that the EEOC was not required to comply with Rule 23 and recommended that the motion be denied. The District Court adopted the recommendation, denied the motion to dismiss, and then certified the issue for interlocutory appeal to the Ninth Circuit. The Court of Appeals accepted the appeal, see 28 U. S. C. § 1292 (b), and affirmed the District Court's ruling.

II

We agree with the Court of Appeals that Rule 23 is not applicable to an enforcement action brought by the EEOC in its own name and pursuant to its authority under § 706 to prevent unlawful employment practices.[5] We rely on the language of Title VII, the legislative intent underlying the 1972 amendments to Title VII, and the enforcement procedures under Title VII prior to the amendments.

A

Title VII protects all employees of and applicants for employment with a covered employer, employment agency, labor organization, or training program against discrimination based on race, color, religion, sex, or national origin. Section 706 (a) empowers the EEOC "to prevent any person from engaging in any unlawful . . . practice" as set forth in the Title. Sec-

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union. The union also did not participate in the appeal to the Ninth Circuit following the denial of the motion to dismiss. On December 18, 1978, the District Court entered a consent decree against the union; General Telephone's cross-claim for judgment against the union if General Telephone is found liable on the sex discrimination claims is still pending.

The union also did not join in General Telephone's petition for certiorari and is, therefore, a respondent in this Court. See this Court's Rule 21 (4).

[5] Petitioners characterize this action as a "class action"; the EEOC characterizes it as an action "affecting a class of individuals." We need not choose between these characterizations. The issue is whether an action, however it is styled, brought by a Government agency to enforce the federal law with whose enforcement the agency is charged is subject to the requirements of Rule 23.

tion 706 (f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity upon failure to secure an acceptable conciliation agreement,[6] the purpose of the action being to terminate unlawful practices and to secure appropriate relief, including "reinstatement or hiring . . . , with or without back pay," for the victims of the discrimination. See § 706 (g).

Title VII thus itself authorizes the procedure that the EEOC followed in this case. Upon finding reasonable cause to believe that General Telephone had discriminated against female employees, the EEOC filed suit seeking a permanent injunction against the discriminatory practices, remedial action to eradicate the effect of past discrimination, and "make whole" backpay, with interest, for persons adversely affected by the unlawful practices. Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals. Its authority to bring such actions is in no way dependent upon Rule 23, and the Rule has no application to a § 706 suit.

Of course, Title VII defendants do not welcome the prospect of backpay liability; but the law provides for such liability and the EEOC's authority to sue for it. Moreover, the EEOC here requested relief only on behalf of "those persons adversely affected" and "in an amount to be proved at trial." App. 11. There is no claim or suggestion of unjustified, windfall backpay awards. That backpay relief is authorized is no basis for imposing the Rule 23 framework in an EEOC enforcement action. We do no more than follow a straightforward reading of the statute, which seems to us to authorize the EEOC to sue in its own name to enforce federal law by

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[6] The Attorney General is authorized to bring suit against a governmental entity.

obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act.

B

This understanding of the statute is supported by the purpose of the 1972 amendments of providing the EEOC with enforcement authority. The purpose of the amendments, plainly enough, was to secure more effective enforcement of Title VII. As Title VII was originally enacted as part of the Civil Rights Act of 1964, the EEOC's role in eliminating unlawful employment practices was limited to "informal methods of conference, conciliation, and persuasion." Civil actions for enforcement upon the EEOC's inability to secure voluntary compliance could be filed only by the aggrieved person. § 706 (e), 78 Stat. 260. Congress became convinced, however, that the "failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII."[7] S. Rep. No. 92–415, p. 4 (1971). The 1972 amendments to § 706 accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII. In

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[7] The Senate Report on the amendments notes:

"The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination. . . .

"As a consequence, unless the Department of Justice concludes that a pattern or practice of resistance to Title VII is involved, the burden of obtaining enforceable relief rests upon each individual victim of discrimination, who must go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law." S. Rep. No. 92–415, p. 4 (1971).

The Senate Committee contemplated EEOC enforcement through an administrative proceeding followed by a cease-and-desist order with review in the appropriate United States court of appeals. Although a floor amendment changed the procedure to a civil suit in the district court, the policy remained the same.

so doing, Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. The amendments did not transfer all private enforcement to the EEOC and assign to that agency exclusively the task of protecting private interests. The EEOC's civil suit was intended to supplement, not replace, the private action. Cf. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 45 (1974). The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 was not superseded. Under § 706 (f)(1), the aggrieved person may bring his own action at the expiration of the 180-day period of exclusive EEOC administrative jurisdiction if the agency has failed to move the case along to the party's satisfaction, has reached a determination not to sue, or has reached a conciliation or settlement agreement with the respondent that the party finds unsatisfactory. The aggrieved person may also intervene in the EEOC's enforcement action. These private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23. Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by "the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement." 118 Cong. Rec. 4941 (1972). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.[8]

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[8] Cf. *Occidental Life Ins. Co.* v. *EEOC*, 432 U. S. 355, 368 (1977) ("[U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimina-

C

Prior to 1972, the only civil actions authorized other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect "a pattern or practice" of discrimination. These actions did not depend upon the filing of a charge with the EEOC; nor were they designed merely to advance the personal interest of any particular aggrieved person. Prior to 1972, the Department of Justice filed numerous § 707 pattern-or-practice suits. 118 Cong. Rec. 4080 (1972) (remarks of Sen. Williams). In none was it ever suggested that the Attorney General sued in a representative capacity or that his enforcement suit must comply with the requirements of Rule 23;[9] and this was true even though specific relief was awarded to individuals not parties to the suit.[10]

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tion and settling disputes, if possible, in an informal, noncoercive fashion"). Cf. also *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 397–398 (1946) (The Price Administrator "invoke[s] the jurisdiction of the District Court to enjoin acts and practices made illegal by the [Emergency Price Control Act of 1942] and to enforce compliance with the Act. . . . [S]ince the public interest is involved in a proceeding of this nature, [the District Court's] equitable powers assume an even broader and more flexible character than when only a private controversy is at stake").

[9] Nor has it been so suggested in § 707 suits brought since 1972. In fact, the only Court of Appeals to hold that the EEOC must comply with Rule 23 in its § 706 actions has intimated that the procedural requirements would not apply in a § 707 action. The Fifth Circuit, in *EEOC* v. *D. H. Holmes Co.*, although imposing the Rule 23 strictures on § 706 actions, noted "emphatically that this is *not* a situation in which application of procedural rules will thwart any substantive right whatsoever. "*If*, for any reason, EEOC is not certified below but still believes a pattern or practice of discrimination exists in the Holmes Company, its recourse is to file a suit under § 707. . . ." 556 F. 2d, at 792, n. 8.

[10] See, *e. g.*, *United States* v. *Chesapeake & O. R. Co.*, 471 F. 2d 582, 589–590 (CA4 1972) (constructive seniority), cert. denied *sub nom. Railroad Trainmen* v. *United States*, 411 U. S. 939 (1973); *United States* v. *St. Louis-S. F. R. Co.*, 464 F. 2d 301, 309–311 (CA8 1972) (en banc) (preferential hiring and constructive seniority), cert. denied *sub nom. Transportation Union* v. *United States*, 409 U. S. 1107 (1973); *United*

The 1972 amendments, in addition to providing for a § 706 suit by the EEOC pursuant to a charge filed by a private party, transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion. In discussing the transfer,[11] Senator Hruska described § 707 actions as "in the nature of class actions." 118 Cong. Rec. 4080 (1972). Senator Williams then noted that, upon the transfer, "[t]here will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern or practice' charge and those which the [EEOC] will be able to bring." *Id.*, at 4081. Senator Javits agreed with both Senators: "The EEOC . . . has the authority to institute exactly the same actions that the Department of Justice does under pattern or practice." [12] Senator Javits further noted

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States v. *Ironworkers Local 86*, 443 F. 2d 544, 548, 552–554 (CA9) (preferential hiring), cert. denied, 404 U. S. 984 (1971).

Since 1972, backpay has also been awarded in pattern-or-practice suits, and without suggestion that Rule 23 is implicated. *E. g.*, *EEOC* v. *Detroit Edison Co.*, 515 F. 2d 301, 314–315 (CA6 1975); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 919–920 (CA5 1973); cf. *United States* v. *N. L. Industries, Inc.*, 479 F. 2d 354, 378–380 (CA8 1973). And we see nothing to indicate that prior to 1972, in cases where backpay was requested and denied, the result rested on the ground that the Government could not obtain individual relief in its enforcement action without compliance with Rule 23. See, *e. g.*, *United States* v. *St. Louis-S. F. R. Co.*, *supra*, at 311; *United States* v. *Hayes Int'l Corp.*, 456 F. 2d 112, 121 (CA5 1972).

[11] The legislative debate at this point focused on whether and when to make the transfer. The issue arose in the wake of the decision the day before to empower the EEOC to proceed by civil action and not cease-and-desist order. As finally agreed upon, the transfer was to occur two years after the effective date of the amendments.

[12] Senator Javits goes on here to note that "[t]hese are essentially class actions, and if they can sue for an individual claimant, then they can sue for a group of claimants." Given its juxtaposition between the discussion of the Department of Justice's pattern-or-practice actions and the EEOC's newly granted ability to sue, it is unclear whether the Senator's characterization here as "class actions" referred to § 707 or § 706.

that "if [the EEOC] proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits. . . . [T]he power to sue . . . fully qualifies the [EEOC] to take precisely the action now taken by the Department of Justice." *Id.*, at 4081–4082. As we have said, the Department of Justice brought its suits in the name of the United States and without obtaining certification under Rule 23—it did not sue as a representative of the persons aggrieved—and we must assume Congress' familiarity with the procedure. It is clear that with the 1972 amendments Congress intended the EEOC to proceed in the same manner; and thus, given the context, it is similarly clear that the references in debate to "class" suits referred to the availability of relief and not the procedure that would be applicable in such actions.[13]

III

It is also apparent that forcing EEOC civil actions into the Rule 23 model would in many cases distort the Rule as it is

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[13] Petitioners rely heavily on the statement by Senator Javits immediately following the quotation set out in n. 12, *supra*, that "this is provided for by the rules of civil procedure in the Federal courts." The Senator then elaborated:

"I have referred to the rules of civil procedure. I now refer specifically to rule 23 of those rules, which is entitled Class Actions and which give[s] the opportunity to engage in the Federal Court in class actions by properly suing parties. We ourselves have given permission to the EEOC to be a properly suing party." 118 Cong. Rec. 4082 (1972).

Again, given the context, the point that emerges most clearly is that the Senator's comments merely compare the effect of the amendments to § 706 with the Rule 23 procedure; the comments were not intended to impose the requirements of the Rule on the § 706 action. Indeed, the idea that the EEOC's enforcement suits were to be subject to the full range of Rule 23 requirements is completely inconsistent with the Senator's own comparisons, noted in text, between the EEOC's authority under § 706 as amended and the authority of the Department of Justice under the original version of § 707.

commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by § 706 (f)(1). The undesirability of doing either supports our conclusion that the procedural requirements of the Rule do not apply.

A

Rule 23 (a), see n. 3, *supra*, imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation. When considered in the light of these requirements, it is clear that the Rule was not designed to apply to EEOC actions brought in its own name for the enforcement of federal law. Some of the obvious and more severe problems are worth noting.

The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations. Title VII, however, applies to employers with as few as 15 employees. When judged by the size of the putative class in various cases in which certification has been denied, this minimum would be too small to meet the numerosity requirement.[14] In such cases, applying Rule 23 would require the EEOC to join all aggrieved parties despite its statutory authority to proceed solely in its own name.

The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would

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[14] See, *e. g.*, *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co. of Texas*, 511 F. 2d 1073, 1077 (CA10 1975) (37 class plaintiffs); *Peterson* v. *Albert M. Bender Co.*, 75 F. R. D. 661, 667 (ND Cal. 1977) (35–45); *Murray* v. *Norberg*, 423 F. Supp. 795, 798 (RI 1976) (fewer than 20); *Chmieleski* v. *City Products Corp.*, 71 F. R. D. 118, 150–151 (WD Mo. 1976) (22); *Lopez* v. *Jackson County Bd. of Supervisors*, 375 F. Supp. 1194, 1196–1197 (SD Miss. 1974) (16); *Moreland* v. *Rucker Pharmacal Co.*, 63 F. R. D. 611, 613–614 (WD La. 1974) (26); *Anderson* v. *Home Style Stores, Inc.*, 58 F. R. D. 125, 130–131 (ED Pa. 1972) (18).

seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. See, *e. g.*, *EEOC* v. *General Electric Co.*, 532 F. 2d 359, 366 (CA4 1976); *EEOC* v. *McLean Trucking Co.*, 525 F. 2d 1007, 1010 (CA6 1975). The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

We note finally that the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes. But unlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged. The individual victim is given his right to intervene for this very reason. The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist. We are reluctant, absent clear congressional guidance, to subject § 706 (f)(1) actions to requirements that might disable the enforcement agency from advancing the public interest in the manner and to the extent contemplated by the statute.

B

We observe that General Telephone does not urge application of Rule 23 to EEOC enforcement actions in the expectation or hope that the agency could not comply and would be forced to drop its action against General Telephone. Indeed, petitioners urge that the EEOC, in proper cases, would be able to meet the Rule 23 requirements. Brief for Petitioners 16–22. As we understand, petitioners' objective in seeking to invoke Rule 23 is aimed at securing a judgment in the EEOC's suit that will be binding upon all individuals with similar grievances in the class or subclasses that might be certified. We are sensitive to the importance of the res judicata aspects of Rule 23 judgments, but we are not free to depart from what we believe the statutory design to be.

We have noted in a related context the interface between employment discrimination remedies under a collective-bargaining agreement and those under Title VII. *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), held that the employee did not forfeit Title VII relief by invoking the grievance and arbitration procedures under the collective-bargaining contract. We noted that "federal courts have been assigned plenary powers to secure compliance with Title VII." *Id.*, at 45. Similarly, the courts retain remedial powers under Title VII despite a finding by the EEOC of no reasonable cause to believe that Title VII has been violated. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 798–799 (1973). We have also stressed the strong congressional intent to provide "make whole" relief to Title VII claimants: " 'The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . .' 118 Cong. Rec. 7168 (1972)." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975).

The 1972 amendments retained the private right of action as "an essential means of obtaining judicial enforcement of

Title VII," *Alexander* v. *Gardner-Denver Co., supra,* at 45, while also giving the EEOC broad enforcement powers. In light of the "general intent to accord parallel or overlapping remedies against discrimination," 415 U. S., at 47, we are unconvinced that it would be consistent with the remedial purpose of the statutes to bind all "class" members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. This is especially true given the possible differences between the public and private interests involved. Cf. *Occidental Life Ins. Co.* v. *EEOC,* 432 U. S. 355 (1977).

The courts, however, are not powerless to prevent undue hardship to the defendant and should perform accordingly. The employer may, by discovery and other pretrial proceedings, determine the nature and extent of the claims that the EEOC intends to pursue against it. Here, as we have noted, the EEOC moved to try initially the issue of liability, not to avoid proving individual claims, but merely to postpone such proof. It also goes without saying that the courts can and should preclude double recovery by an individual. Cf. *Alexander* v. *Gardner-Denver Co., supra,* at 51, n. 14. Also, where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action.[15] The Title VII remedy is an equitable one; a court of equity should adjust the relief accordingly.

IV

We hold, therefore, that the EEOC may maintain its § 706 civil actions for the enforcement of Title VII and may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule

[15] An acceptance of the benefits under an EEOC-negotiated settlement could be drafted to provide for a similar relinquishment.

of Civil Procedure 23.[16] The judgment of the Ninth Circuit is accordingly

Affirmed.

THE CHIEF JUSTICE, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS, for the reasons that are well stated by the Court of Appeals for the Fifth Circuit in *EEOC* v. *D. H. Holmes Co., Ltd.*, 556 F. 2d 787 (1977), cert. denied, 436 U. S. 962 (1978), would reverse the judgment in this case.

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[16] We by no means suggest that the Federal Rules generally are inapplicable to the EEOC's §706 actions. Title VII itself refers to Rule 53, see § 706 (f) (5), and the Court itself has discussed Rule 54 (c). See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975). We hold only that the nature of the EEOC's enforcement action is such that it is not properly characterized as a "class action" subject to the procedural requirements of Rule 23.

Syllabus

CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* SULLIVAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–1832. Argued February 20, 1980—Decided May 12, 1980

Two privately retained lawyers represented respondent and two others charged with the same murders. Respondent, who was tried first, made no objection to the multiple representation. The defense rested at the close of the prosecutor's case, and respondent was convicted. The two codefendants later were acquitted at separate trials. Respondent then sought collateral relief under Pennsylvania law, alleging that he had not received effective assistance of counsel because his lawyers represented conflicting interests. After a hearing at which both defense lawyers testified, the Pennsylvania Court of Common Pleas denied relief. The Pennsylvania Supreme Court affirmed, finding no multiple representation and concluding that the decision to rest the defense was a reasonable trial tactic. Respondent next sought habeas corpus relief in Federal District Court, but the court accepted the Pennsylvania Supreme Court's conclusion that respondent's lawyer did not represent the other defendants and further concluded that respondent had adduced no evidence of a conflict of interest. The Court of Appeals for the Third Circuit reversed. It held that the participation of the two lawyers in all three trials established as a matter of law that both lawyers represented all three defendants, and that the possibility of conflict among the interests represented by these lawyers established a violation of respondent's Sixth Amendment right to counsel.

Held:

1. The Court of Appeals did not exceed the proper scope of review when it rejected the Pennsylvania Supreme Court's conclusion that the two lawyers had not undertaken multiple representation. The Pennsylvania court's conclusion was a mixed determination of law and fact not covered by 28 U. S. C. § 2254 (d), which provides that a state court's determination after a hearing on the merits of a factual issue shall be presumed to be correct. Pp. 341–342.

2. A state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. If a defendant's retained counsel does not provide the adequate legal assistance guaranteed by the Sixth Amendment, a

serious risk of injustice infects the trial itself. When the State obtains a conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. Thus, there is no merit to petitioners' claim that failings of retained counsel cannot provide the basis for federal habeas corpus relief. Pp. 342–345.

3. Respondent is not entitled to federal habeas corpus relief upon showing that the state trial court failed to inquire into the potential for conflicts of interest and that his lawyers had a possible conflict of interests. Pp. 345–350.

(a) The Sixth Amendment requires a state trial court to investigate timely objections to multiple representation. But unless the state trial court knows or reasonably should know that a particular conflict exists, the court itself need not initiate an inquiry into the propriety of multiple representation. Under the circumstances of this case, the Sixth Amendment imposed upon the trial court no affirmative duty to inquire. Pp. 345–348.

(b) Unless the trial court fails to afford a defendant who objects to multiple representation an opportunity to show that potential conflicts impermissibly imperil his right to a fair trial, a reviewing court cannot presume that the possibility for conflict resulted in ineffective assistance of counsel. In such a case, a defendant must demonstrate that an actual conflict of interest adversely affected the adequacy of his representation. Pp. 348–350.

(c) The possibility of a conflict of interest is insufficient to impugn a criminal conviction. In order to establish a violation of the Sixth Amendment, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. P. 350.

593 F. 2d 512, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., STEWART, WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined, in Part III of which BRENNAN, J., joined, and in Parts I, II, and III of which MARSHALL, J., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the result, *post*, p. 350. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 354.

Steven H. Goldblatt argued the cause for petitioners. With him on the brief were *Michael F. Henry* and *Marianne E. Cox*.

Marilyn J. Gelb argued the cause and filed a brief for respondent.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented is whether a state prisoner may obtain a federal writ of habeas corpus by showing that his retained defense counsel represented potentially conflicting interests.

I

Respondent John Sullivan was indicted with Gregory Carchidi and Anthony DiPasquale for the first-degree murders of John Gorey and Rita Janda. The victims, a labor official and his companion, were shot to death in Gorey's second-story office at the Philadelphia headquarters of Teamsters' Local 107. Francis McGrath, a janitor, saw the three defendants in the building just before the shooting. They appeared to be awaiting someone, and they encouraged McGrath to do his work on another day. McGrath ignored their suggestions. Shortly afterward, Gorey arrived and went to his office. McGrath then heard what sounded like firecrackers exploding in rapid succession. Carchidi, who was in the room where McGrath was working, abruptly directed McGrath to leave the building and to say nothing. McGrath hastily complied. When he returned to the building about 15 minutes later, the defendants were gone. The victims' bodies were discovered the next morning.

Two privately retained lawyers, G. Fred DiBona and A. Charles Peruto, represented all three defendants throughout the state proceedings that followed the indictment. Sullivan had different counsel at the medical examiner's inquest, but he thereafter accepted representation from the two lawyers retained by his codefendants because he could not afford to pay his own lawyer.[1] At no time did Sullivan or his lawyers

[1] DiBona and Peruto were paid in part with funds raised by friends of the three defendants. The record does not disclose the source of the balance of their fee, but no part of the money came from either Sullivan or his family. See *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512, 518, and n. 7 (CA3 1979).

object to the multiple representation. Sullivan was the first defendant to come to trial. The evidence against him was entirely circumstantial, consisting primarily of McGrath's testimony. At the close of the Commonwealth's case, the defense rested without presenting any evidence. The jury found Sullivan guilty and fixed his penalty at life imprisonment. Sullivan's post-trial motions failed, and the Pennsylvania Supreme Court affirmed his conviction by an equally divided vote. *Commonwealth* v. *Sullivan*, 446 Pa. 419, 286 A. 2d 898 (1971).[2] Sullivan's codefendants, Carchidi and DiPasquale, were acquitted at separate trials.

Sullivan then petitioned for collateral relief under the Pennsylvania Post Conviction Hearing Act, Pa. Stat. Ann., Tit. 19, § 1180–1 *et seq.* (Purdon Supp. 1979–1980). He alleged, among other claims, that he had been denied effective assistance of counsel because his defense lawyers represented conflicting interests. In five days of hearings, the Court of Common Pleas heard evidence from Sullivan, Carchidi, Sullivan's lawyers, and the judge who presided at Sullivan's trial.

DiBona and Peruto had different recollections of their roles at the trials of the three defendants. DiBona testified that he and Peruto had been "associate counsel" at each trial. App. 32a. Peruto recalled that he had been chief counsel for Carchidi and DePasquale, but that he merely had assisted DiBona in Sullivan's trial. DiBona and Peruto also gave conflicting accounts of the decision to rest Sullivan's defense. DiBona said he had encouraged Sullivan to testify even though the Commonwealth had presented a very weak case. Peruto remembered that he had not "want[ed] the defense to go on because I thought we would only be exposing

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[2] The Pennsylvania Supreme Court denied two petitions for reargument. See *Commonwealth* v. *Sullivan*, 472 Pa. 129, 180, 371 A. 2d 468, 492 (1977) (Pomeroy, J., concurring and dissenting). Meanwhile, Sullivan's *pro se* petitions for federal habeas corpus relief were dismissed for failure to exhaust state remedies. See *United States ex rel. Sullivan* v. *Cuyler*, *supra*, at 515, and n. 4.

the [defense] witnesses for the other two trials that were coming up." *Id.*, at 57a. Sullivan testified that he had deferred to his lawyers' decision not to present evidence for the defense. But other testimony suggested that Sullivan preferred not to take the stand because cross-examination might have disclosed an extramarital affair. Finally, Carchidi claimed he would have appeared at Sullivan's trial to rebut McGrath's testimony about Carchidi's statement at the time of the murders.

The Court of Common Pleas held that Sullivan could take a second direct appeal because counsel had not assisted him adequately in his first appeal. App. to Pet. for Cert. 5F. The court did not pass directly on the claim that defense counsel had a conflict of interest, but it found that counsel fully advised Sullivan about his decision not to testify. *Id.*, at 7F. All other claims for collateral relief were rejected or reserved for consideration in the new appeal.

The Pennsylvania Supreme Court affirmed both Sullivan's original conviction and the denial of collateral relief. *Commonwealth* v. *Sullivan*, 472 Pa. 129, 371 A. 2d 468 (1977). The court saw no basis for Sullivan's claim that he had been denied effective assistance of counsel at trial. It found that Peruto merely assisted DiBona in the Sullivan trial and that DiBona merely assisted Peruto in the trials of the other two defendants. Thus, the court concluded, there was "no dual representation in the true sense of the term." *Id.*, at 161, 371 A. 2d, at 483. The court also found that resting the defense was a reasonable tactic which had not denied Sullivan the effective assistance of counsel. *Id.*, at 162, 371 A. 2d, at 483–484.

Having exhausted his state remedies, Sullivan sought habeas corpus relief in the United States District Court for the Eastern District of Pennsylvania. The petition was referred to a Magistrate, who found that Sullivan's defense counsel had represented conflicting interests. The District Court, however, accepted the Pennsylvania Supreme Court's conclusion

that there had been no multiple representation. The court also found that, assuming there had been multiple representation, the evidence adduced in the state postconviction proceeding revealed no conflict of interest. App. to Pet. for Cert. 5C–8C.

The Court of Appeals for the Third Circuit reversed. *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512 (1979). It first held that the participation by DiBona and Peruto in the trials of Sullivan and his codefendants established, as a matter of law, that both lawyers had represented all three defendants. The court recognized that multiple representation " 'is not tantamount to the denial of effective assistance of counsel. . . .' " But it held that a criminal defendant is entitled to reversal of his conviction whenever he makes " 'some showing of a possible conflict of interest or prejudice, however remote. . . .' " *Id.*, at 519, quoting *Walker* v. *United States*, 422 F. 2d 374, 375 (CA3) (*per curiam*), cert. denied, 399 U. S. 915 (1970). See also *United States ex rel. Hart* v. *Davenport*, 478 F. 2d 203, 210 (CA3 1973). The court acknowledged that resting at the close of the prosecutor's case "would have been a legitimate tactical decision if made by independent counsel." [3] Nevertheless, the court thought that action alone raised a possibility of conflict sufficient to prove a violation of Sullivan's Sixth Amendment rights. The court found support for its conclusion in Peruto's admission that concern for Sullivan's codefendants had affected his judgment that Sullivan should not present a defense. To give weight to DiBona's contrary testimony, the court held, "would be to . . . require a showing of actual prejudice." 593 F. 2d, at 522.[4]

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[3] Indeed, the Court of Appeals noted that the Pennsylvania Supreme Court at first divided evenly on whether the Commonwealth's evidence was sufficient to support a conviction. 593 F. 2d, at 521, n. 10.

[4] Judge Garth, with whom Judges Adams and Rosenn joined, filed an opinion dissenting from the denial of a petition for rehearing en banc. *Id.*, at 524.

We granted certiorari, 444 U. S. 823 (1979), to consider recurring issues left unresolved by *Holloway* v. *Arkansas*, 435 U. S. 475 (1978). We now vacate and remand.

II

At the outset, we must consider whether the Court of Appeals exceeded the proper scope of review when it rejected the Pennsylvania Supreme Court's conclusion that DiBona and Peruto had not undertaken multiple representation. Petitioners claim that this determination by the Pennsylvania Supreme Court was a factfinding entitled to a presumption of correctness under 28 U. S. C. § 2254 (d).

Section 2254 (d) provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . [and] evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct" unless the applicant for a federal writ of habeas corpus can establish one of the enumerated causes for exception. The Pennsylvania Supreme Court's holding does not fall within this statute because it is a conclusion of law rather than a finding of fact.[5]

In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the Court examined the distinction between law and fact as it applies on collateral review of a state conviction. The *Townsend* opinion, the precursor of § 2254 (d), noted that the phrase

[5] Petitioners must rely solely on the State Supreme Court's holding because the state court that heard evidence on Sullivan's petition for collateral relief did not decide whether defense counsel had represented conflicting interests. See *supra*, at 339. The State Supreme Court resolved that issue on the second direct appeal without the benefit of a trial court finding. Since we conclude that a determination of whether counsel undertook multiple representation is not a finding of fact, we need not decide whether the statements of an appellate court can be "determination[s] after a hearing on the merits of a factual issue" within the meaning of 28 U. S. C. § 2254 (d). Compare *Velleca* v. *Superintendent*, 523 F. 2d 1040, 1041–1042 (CA1 1975) (*per curiam*), with *Hill* v. *Nelson*, 466 F. 2d 1346, 1348 (CA9 1972) (*per curiam*).

"issues of fact" refers "to what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators. . . .'" 372 U. S., at 309, n. 6, quoting *Brown* v. *Allen*, 344 U. S. 443, 506 (1953) (opinion of Frankfurter, J.). Findings about the roles DiBona and Peruto played in the defenses of Sullivan and his codefendants are facts in this sense. But the holding that the lawyers who played those roles did not engage in multiple representation is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. Cf. *Brewer* v. *Williams*, 430 U. S. 387, 403–404 (1977); *Neil* v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972). That holding is open to review on collateral attack in a federal court.

The Court of Appeals carefully recited the facts from which it concluded that DiBona and Peruto represented both Sullivan and his codefendants. The court noted that both lawyers prepared the defense in consultation with all three defendants, that both advised Sullivan on whether he should rest his defense, and that both played important roles at all three trials. 593 F. 2d, at 518–519. In fact, the transcript of Sullivan's trial shows that Peruto rather than DiBona rested the defense. App. 265a. We agree with the Court of Appeals that these facts establish the existence of multiple representation.

III

We turn next to the claim that the alleged failings of Sullivan's retained counsel cannot provide the basis for a writ of habeas corpus because the conduct of retained counsel does not involve state action.[6] A state prisoner can win a federal

[6] Although the petitioners did not present this state action argument to the Court of Appeals, both parties have briefed and argued it in this Court. Since resolution of this question of law is a "predicate to an intelligent resolution" of the question on which we granted certiorari, see *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980), we must address it. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foun-*

writ of habeas corpus only upon a showing that the State participated in the denial of a fundamental right protected by the Fourteenth Amendment. The right to counsel guaranteed by the Sixth Amendment is a fundamental right. *Argersinger* v. *Hamlin*, 407 U. S. 25, 29–33 (1972). In this case, Sullivan retained his own lawyers, but he now claims that a conflict of interest hampered their advocacy. He does not allege that state officials knew or should have known that his lawyers had a conflict of interest. Thus, we must decide whether the failure of retained counsel to provide adequate representation can render a trial so fundamentally unfair as to violate the Fourteenth Amendment.

This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. See *Lisenba* v. *California*, 314 U. S. 219, 236–237 (1941); *Moore* v. *Dempsey*, 261 U. S. 86, 90–91 (1923). The Court recognized as much in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), when it held that a defendant who must face felony charges in state court without the assistance of counsel guaranteed by the Sixth Amendment has been denied due process of law. Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. *Id.*, at 344; see *Johnson* v. *Zerbst*, 304 U. S. 458, 467–468 (1938). When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty. See *Argersinger* v. *Hamlin*, *supra*, at 29–33.[7]

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dation, 402 U. S. 313, 320, n. 6 (1971). See generally R. Stern & E. Gressman, Supreme Court Practice § 6.27, pp. 458–461 (5th ed. 1978).

[7] See generally *Fitzgerald* v. *Estelle*, 505 F. 2d 1334, 1345–1346 (CA5 1974) (en banc) (Godbold, J., concurring in part and dissenting in part), cert. denied, 422 U. S. 1011 (1975); *West* v. *Louisiana*, 478 F. 2d 1026, 1032–1034 (CA5 1973), vacated and remanded, 510 F. 2d 363 (1975) (en banc).

Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. A guilty plea is open to attack on the ground that counsel did not provide the defendant with "reasonably competent advice." *McMann* v. *Richardson*, 397 U. S. 759, 770–771 (1970); see *Tollett* v. *Henderson*, 411 U. S. 258, 267 (1973). Furthermore, court procedures that restrict a lawyer's tactical decision to put the defendant on the stand unconstitutionally abridge the right to counsel. *Brooks* v. *Tennessee*, 406 U. S. 605, 612–613 (1972) (requiring defendant to be first defense witness); *Ferguson* v. *Georgia*, 365 U. S. 570, 593–596 (1961) (prohibiting direct examination of defendant). See also *Geders* v. *United States*, 425 U. S. 80 (1976); *Herring* v. *New York*, 422 U. S. 853 (1975). Thus, the Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.

A proper respect for the Sixth Amendment disarms petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. We may assume with confidence that most counsel, whether retained or appointed, will protect the rights of an accused. But experience teaches that, in some cases, retained counsel will not provide adequate representation. The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.[8] Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a

[8] See Polur, Retained Counsel, Assigned Counsel: Why the Dichotomy?, 55 A. B. A. J. 254, 255 (1969).

distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers.[9]

IV

We come at last to Sullivan's claim that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment because his lawyers had a conflict of interest. The claim raises two issues expressly reserved in *Holloway* v. *Arkansas,* 435 U. S., at 483–484. The first is whether a state trial judge must inquire into the propriety of multiple representation even though no party lodges an objection. The second is whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel.

A

In *Holloway,* a single public defender represented three defendants at the same trial. The trial court refused to consider the appointment of separate counsel despite the defense lawyer's timely and repeated assertions that the interests of his clients conflicted. This Court recognized that a lawyer forced to represent codefendants whose interests conflict cannot provide the adequate legal assistance required by the Sixth Amendment. *Id.,* at 481–482. Given the trial court's failure to respond to timely objections, however, the Court did not consider whether the alleged conflict actually existed. It simply held that the trial court's error unconstitutionally endangered the right to counsel. *Id.,* at 483–487.

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[9] As the Court of Appeals for the Third Circuit said in *United States ex rel. Hart* v. *Davenport,* 478 F. 2d 203, 211 (1973):

"A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly that the nonindigent, who must retain an attorney if he can afford one, would be entitled to less protection. . . . The effect upon the defendant—confinement as a result of an unfair state trial—is the same whether the inadequate attorney was assigned or retained."

Holloway requires state trial courts to investigate timely objections to multiple representation. But nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case.[10] Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.[11] Absent special circumstances,

[10] In certain cases, proposed Federal Rule of Criminal Procedure 44 (c) provides that the federal district courts "shall promptly inquire with respect to . . . joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation." See also ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4 (b) (App. Draft 1972).

Several Courts of Appeals already invoke their supervisory power to require similar inquiries. See *United States* v. *Waldman*, 579 F. 2d 649, 651–652 (CA1 1978); *United States* v. *DeBerry*, 487 F. 2d 448, 452–454 (CA2 1973); *United States* v. *Cox*, 580 F. 2d 317, 321 (CA8 1978), cert. denied, 439 U. S. 1075 (1979); *United States* v. *Lawriw*, 568 F. 2d 98 (CA8 1977), cert. denied, 435 U. S. 969 (1978); cf. *Ford* v. *United States*, 126 U. S. App. D. C. 346, 348–349, 379 F. 2d 123, 125–126 (1967). As our promulgation of Rule 44 (c) suggests, we view such an exercise of the supervisory power as a desirable practice. See generally Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 Harv. L. Rev. 633, 653–654 (1980).

Although some Circuits have said explicitly that the Sixth Amendment does not require an inquiry into the possibility of conflicts, *United States* v. *Steele*, 576 F. 2d 111 (CA6) (*per curiam*), cert. denied, 439 U. S. 928 (1978); *United States* v. *Mavrick*, 601 F. 2d 921, 929 (CA7 1979), a recent opinion in the Second Circuit held otherwise, *Colon* v. *Fogg*, 603 F. 2d 403, 407 (1979).

[11] ABA Code of Professional Responsibility, DR 5–105, EC 5–15 (1976); ABA Project on Standards for Criminal Justice, Defense Function § 3.5 (b) (App. Draft 1971).

Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation. Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 950, and n. 40 (1978). The private bar may be less alert to the importance of avoiding multiple

therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist.[12] Indeed, as the Court noted in *Holloway, supra,* at 485–486, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. "An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'" 435 U. S., at 485, quoting *State* v. *Davis,* 110 Ariz. 29, 31, 514 P. 2d 1025, 1027 (1973). Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.[13]

Nothing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of interest. The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests. No participant in Sullivan's trial ever objected to the multiple representation. DiBona's opening argument for Sullivan outlined a defense compatible with the view that none of the defendants was connected with the murders. See Brief for Respondent 7. The opening argument also suggested that counsel was not afraid to call witnesses whose testimony might be needed at the trials of Sullivan's codefendants. See *id.,* at 8–9. Finally, as the Court of Appeals noted, counsel's critical decision to

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representation in criminal cases. See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 152–157 (1978); Lowenthal, *supra,* at 961–963.

[12] See *United States* v. *Kidding,* 560 F. 2d 1303, 1310 (CA7), cert. denied, 434 U. S. 872 (1977); *United States* v. *Mandell,* 525 F. 2d 671, 675–677 (CA7 1975), cert. denied, 423 U. S. 1049 (1976); Geer, *supra* n. 11, at 145–146.

[13] Cf. *United States* v. *Medel,* 592 F. 2d 1305, 1312–1313 (CA5 1979); *Foxworth* v. *Wainwright,* 516 F. 2d 1072, 1076–1077 (CA5 1975).

rest Sullivan's defense was on its face a reasonable tactical response to the weakness of the circumstantial evidence presented by the prosecutor. 593 F. 2d, at 521, and n. 10. On these facts, we conclude that the Sixth Amendment imposed upon the trial court no affirmative duty to inquire into the propriety of multiple representation.

B

Holloway reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest. See 435 U. S., at 482. Since a possible conflict inheres in almost every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such an opportunity, a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where " '[a] common defense . . . gives strength against a common attack.' " *Id.*, at 482–483, quoting *Glasser* v. *United States*, 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting).

In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.[14] In *Glasser* v. *United States*, for

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[14] A substantial majority of the Courts of Appeals require defendants who contend that multiple representation violated their Sixth Amendment rights to identify an actual conflict of interest. See *United States* v. *Lovano*, 420 F. 2d 769, 773 (CA2), cert. denied, 397 U. S. 1071 (1970); *United States* v. *Atkinson*, 565 F. 2d 1283, 1284–1285 (CA4 1977), cert. denied, 436 U. S. 944 (1978); *Foxworth* v. *Wainwright*, *supra*, at 1077; *Thacker* v. *Bordenkircher*, 590 F. 2d 640, 642 (CA6), cert. denied, 442 U. S. 912 (1979); *United States* v. *Mandell*, *supra*, at 677–678; *United States* v. *Cox*, 580 F. 2d, at 321–323; *United States* v. *Kutas*, 542 F. 2d 527, 529 (CA9 1976), cert. denied, 429 U. S. 1073 (1977); cf. *United*

example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence. *Id.*, at 72–75. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." *Id.*, at 75. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction.

Dukes v. *Warden*, 406 U. S. 250 (1972), presented a contrasting situation. Dukes pleaded guilty on the advice of two lawyers, one of whom also represented Dukes' codefendants on an unrelated charge. Dukes later learned that this lawyer had sought leniency for the codefendants by arguing that their cooperation with the police induced Dukes to plead guilty. Dukes argued in this Court that his lawyer's conflict of interest had infected his plea. We found " 'nothing in the record . . . which would indicate that the alleged conflict resulted in ineffective assistance of counsel and did in fact render the plea in question involuntary and unintelligent.' " *Id.*, at 256, quoting *Dukes* v. *Warden*, 161 Conn. 337, 344, 288 A. 2d 58, 62 (1971). Since Dukes did not identify an actual lapse in representation, we affirmed the denial of habeas corpus relief.

Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U. S., at 76. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prej-

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States v. *Carrigan*, 543 F. 2d 1053, 1056 (CA2 1976) (burden of proof shifts when trial court fails to inquire into possibility of conflict).

udice in order to obtain relief. See *Holloway, supra,* at 487–491. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. See *Glasser, supra,* at 72–75.[15]

C

The Court of Appeals granted Sullivan relief because he had shown that the multiple representation in this case involved a possible conflict of interest. We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. Sullivan believes he should prevail even under this standard. He emphasizes Peruto's admission that the decision to rest Sullivan's defense reflected a reluctance to expose witnesses who later might have testified for the other defendants. The petitioner, on the other hand, points to DiBona's contrary testimony and to evidence that Sullivan himself wished to avoid taking the stand. Since the Court of Appeals did not weigh these conflicting contentions under the proper legal standard, its judgment is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, concurring in Part III of the opinion of the Court and in the result.

I agree with the Court, in Part III, *ante,* at 342–345, that the alleged failure of retained counsel to render effective assistance involves state action and thus provides the basis for a writ of habeas corpus. I cannot, however, join Part IV of the opinion.

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[15] See Comment, Conflict of Interests in Multiple Representation of Criminal Co-Defendants, 68 J. Crim. L. & C. 226, 231–232 (1977).

Holloway v. *Arkansas*, 435 U. S. 475 (1978), settled that the Sixth Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants. While *Holloway* also established that defendants usually have the right to share a lawyer if they so choose, that choice must always be knowing and intelligent. The trial judge, therefore, must play a positive role in ensuring that the choice was made intelligently. The court cannot delay until a defendant or an attorney raises a problem, for the Constitution also protects defendants whose attorneys fail to consider, or choose to ignore, potential conflict problems. "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel." *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record." *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938). This principle is honored only if the accused has the active protection of the trial court in assuring that no potential for divergence in interests threatens the adequacy of counsel's representation.

It is no imposition on a trial court to require it to find out whether attorneys are representing "two or more defendants [who] have been jointly charged . . . or have been joined for trial . . . ," to use the language of proposed Federal Rule of Criminal Procedure 44 (c).[1] It is probable as a practical

[1] Proposed Rule 44 (c) provides:

"Whenever two or more defendants have been jointly charged pursuant to Rule 8 (b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally

matter that virtually all instances of joint representation will appear from the face of the charging papers and the appearances filed by attorneys. The American Bar Association's standards under the ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4 (b) (App. Draft 1972), are framed on the premise that judges will be readily able to ascertain instances of joint representation.

"[A] possible conflict inheres in almost every instance of multiple representation." *Ante*, at 348. Therefore, upon discovery of joint representation, the duty of the trial court is to ensure that the defendants have not unwittingly given up their constitutional right to effective counsel. This is necessary since it is usually the case that defendants will not know what their rights are or how to raise them. This is surely true of the defendant who may not be receiving the effective assistance of counsel as a result of conflicting duties owed to other defendants. Therefore, the trial court cannot safely assume that silence indicates a knowledgeable choice to proceed jointly. The court must at least affirmatively advise the defendants that joint representation creates potential hazards which the defendants should consider before proceeding with the representation.[2]

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advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

Congress has postponed the effectiveness of Rule 44 (c) until December 1, 1980, or until, and to the extent approved by, an Act of Congress, whichever is earlier. Pub. L. 92–42, 93 Stat. 326.

[2] Though proposed Rule 44 (c), n. 1, *supra*, provides a good model, the court's inquiry need not take any particular form. See also ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4 (b) (App. Draft 1972), which provides:

"Whenever two or more defendants who have been jointly charged, or whose cases have been consolidated, are represented by the same attorney,

Had the trial record in the present case shown that respondent made a knowing and intelligent choice of joint representation, I could accept the Court's standard for a postconviction determination as to whether respondent in fact was denied effective assistance. Where it is clear that a defendant has voluntarily chosen to proceed with joint representation, it is fair, if he later alleges ineffective assistance growing out of a conflict, to require that he demonstrate "that a conflict of interest actually affected the adequacy of his representation." *Ante*, at 349. Here, however, where there is no evidence that the court advised respondent about the potential for conflict or that respondent made a knowing and intelligent choice to forgo his right to separate counsel, I believe that respondent, who has shown a significant possibility of conflict,[3] is entitled to a presumption that his representation in fact suffered. Therefore, I would remand the case to allow the

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the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel."

Several Courts of Appeals have imposed some kind of duty of inquiry. See *ante*, at 346, n. 10. One, the First Circuit, has suggested that at least the duty, as opposed to any specific form of inquiry, may be constitutionally mandated. *United States* v. *Waldman*, 579 F. 2d 649, 653 (1978).

[3] The Court of Appeals held that respondent successfully carried the burden of demonstrating "a possibility of prejudice or conflict of interest and that independent counsel might well have chosen a different trial strategy." *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512, 521 (1979). The court based its holding, in part, on the testimony of one of respondent's two trial attorneys. He testified that they chose not to present a defense in respondent's case partly because they did not want to expose their defense before the upcoming trials of respondent's codefendants. Also, they did not want to risk having any evidence come out which, while exculpating respondent, might inculpate one of the codefendants. *Ibid.* The court credited this testimony. *Id.*, at 522.

The facts of this case demonstrate that, contrary to the view of the Court, *ante*, at 347, the provision of separate trials does not always reduce the potential for conflict. Here, in fact, "the potential for a divergence in [the codefendants'] interests," *ibid.*, arose, in part, precisely because there were separate trials.

petitioners an opportunity to rebut this presumption by demonstrating that respondent's representation was not actually affected by the possibility of conflict.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree that the Court of Appeals properly concluded that respondent's lawyers had undertaken multiple representation, and that a conviction obtained when a defendant's retained counsel provided ineffective assistance involves state action that may provide the basis for a writ of habeas corpus. Accordingly, I join Parts I, II, and III of the Court's opinion.

I believe, however, that the potential for conflict of interest in representing multiple defendants is "so grave," see ABA Project on Standards for Criminal Justice, Defense Function, Standard 4–3.5 (b) (App. Draft, 2d ed. 1979), that whenever two or more defendants are represented by the same attorney the trial judge must make a preliminary determination that the joint representation is the product of the defendants' informed choice. I therefore agree with MR. JUSTICE BRENNAN that the trial court has a duty to inquire whether there is multiple representation, to warn defendants of the possible risks of such representation, and to ascertain that the representation is the result of the defendants' informed choice.[1]

I dissent from the Court's formulation of the proper stand-

[1] The determination that the defendant has made an informed choice of counsel would not, of course, establish a waiver that would prevent him from subsequently raising any claim of ineffective assistance of counsel based on a conflict of interest. The dangers of infringing the defendants' privilege against self-incrimination and their right to maintain the confidentiality of the defense strategy foreclose the type of detailed inquiry necessary to establish a knowing and intelligent waiver. Furthermore, the inquiry would take place at such an early stage of the proceedings that not all possible conflicts might be anticipated. See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 145 (1978).

ard for determining whether multiple representation has violated the defendant's right to the effective assistance of counsel. The Court holds that in the absence of an objection at trial, the defendant must show "that an actual conflict of interest adversely affected his lawyer's performance." *Ante*, at 348. If the Court's holding would require a defendant to demonstrate that his attorney's trial performance differed from what it would have been if the defendant had been the attorney's only client, I believe it is inconsistent with our previous cases. Such a test is not only unduly harsh, but incurably speculative as well. The appropriate question under the Sixth Amendment is whether an actual, relevant conflict of interests existed during the proceedings. If it did, the conviction must be reversed. Since such a conflict was present in this case, I would affirm the judgment of the Court of Appeals.[2]

Our cases make clear that every defendant has a constitutional right to "the assistance of an attorney unhindered by a conflict of interests." *Holloway* v. *Arkansas*, 435 U. S. 475, 483, n. 5 (1978). "[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Glasser* v. *United States*, 315 U. S. 60, 70 (1942). If "[t]he possibility of the inconsistent interests of [the clients] was brought home to the court" by means of an objection at trial, *id.*, at 71, the court may not require joint representation. But if no objection was made at trial, the appro-

[2] The Court of Appeals cast its decision in terms of a "potential for conflict of interest," *United States ex rel. Sullivan* v. *Cuyler*, 593 F. 2d 512, 522 (1979), and made no explicit statement that an actual conflict of interest existed. The court's analysis was premised, however, on its conclusion that "[w]e have no basis on which to reject Peruto's sworn admission that he injected improper considerations into the attorney-client relationship." *Ibid.* This statement clearly demonstrates that the court found an actual, relevant conflict of interests.

priate inquiry is whether a conflict actually existed during the course of the representation.

Because it is the simultaneous representation of conflicting interests against which the Sixth Amendment protects a defendant, he need go no further than to show the existence of an actual conflict.[3] An actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney.

Moreover, a showing that an actual conflict adversely af-

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[3] "Conflict of interests" is a term that is often used and seldom defined. The American Bar Association's usage, which has remained essentially unchanged since the promulgation of the Canons of Professional Ethics in 1908, is a fair statement of what is ordinarily meant by the term, and it is that meaning that I adopt here. The ABA Standards state that a lawyer should not undertake multiple representation "if the duty to one of the defendants may conflict with the duty to another." ABA Project on Standards for Criminal Justice, Defense Function, Standard 4–3.5 (b) (App. Draft, 2d ed. 1979). The Code of Professional Responsibility forbids multiple representation "if it would be likely to involve [the lawyer] in representing differing interests," unless the lawyer can adequately represent each client and obtains the informed consent of each. ABA Code of Professional Responsibility, Disciplinary Rule 5–105 (A)–(B) (1976). The Code of Professional Responsibility superseded the Canons of Professional Ethics (1937), which spoke of "conflicting interests" rather than "differing interests." The term was defined in Canon 6: "[A] lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose." The ABA materials do not, of course, define the constitutional standard. However, they are consistent with *Glasser's* emphasis on the interests of the defendants, and the corresponding duties owed by the attorney, rather than on the empirical question of the effect of the conflict on the attorney's performance. See Comment, Conflict of Interests in Multiple Representation of Criminal Co-defendants, 68 J. Crim. L. & C. 226 (1977).

There is a possibility of conflict, then, if the interests of the defendants may diverge at some point so as to place the attorney under inconsistent duties. There is an actual, relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action.

fected counsel's performance is not only unnecessary,[4] it is often an impossible task. As the Court emphasized in *Holloway*:

> "[I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing . . . . It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." 435 U. S., at 490–491 (emphasis in original).

Accordingly, in *Holloway* we emphatically rejected the suggestion that a defendant must show prejudice in order to be entitled to relief. For the same reasons, it would usually be futile to attempt to determine how counsel's conduct would have been different if he had not been under conflicting duties.

In the present case Peruto's testimony, if credited by the court, would be sufficient to make out a case of ineffective assistance by reason of a conflict of interests under even a

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[4] In *Glasser*, the defendant's objection at trial to joint representation was that, as his lawyer put it, "Mr. Glasser feels that if I would represent Mr. Kretske the jury would get an idea that they are together. . . ." 315 U. S., at 68. Whether the attorney's performance was in fact affected by the joint representation is, of course, irrelevant to the merits of such a claim. While the Court did discuss the possibility that the lawyer's failure to cross-examine prosecution witnesses fully or to object to the admission of certain evidence was the result of the joint representation, the possibility that the jury would assume that "birds of a feather flock to the same lawyer," Greer, *supra* n. 1, at 136, was the only objection raised at trial and the Court plainly considered it sufficient to require the appointment of separate counsel for Kretske.

restrictive reading of the Court's standard. In the usual case, however, we might expect the attorney to be unwilling to give such supportive testimony, thereby impugning his professional efforts. Moreover, in many cases the effects of the conflict on the attorney's performance will not be discernible from the record. It is plain to me, therefore, that in some instances the defendant will be able to show there was an actual, relevant conflict, but be unable to show that it changed his attorney's conduct.

It is possible that the standard articulated by the Court may not require a defendant to demonstrate that his attorney chose an action adverse to his interests because of a conflicting duty to another client. Arguably, if the attorney had to make decisions concerning his representation of the defendant under the constraint of inconsistent duties imposed by an actual conflict of interests, the adequacy of the representation was adversely affected. See *ante*, at 350 (defendant must show "that his counsel actively represented conflicting interests"). If that is the case, the Court's view and mine may not be so far apart after all.

Syllabus

NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78–1557. Argued January 7, 1980—Decided May 12, 1980

As one of the means of protecting the interests of beneficiaries under private pension plans for employees, Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) created a plan termination insurance program that became effective in four successive stages. Section 4022 (a) of Title IV provides that if benefits are "nonforfeitable" they are insured by respondent Pension Benefit Guaranty Corporation (PBGC), and under § 4062 (b) of that Title PBGC has a right to reimbursement from the employer for insurance paid to cover nonforfeitable benefits. Section 3 of Title I of ERISA provides that "[f]or purposes of this title [t]he term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." Petitioner employer, pursuant to a collective-bargaining agreement, established a pension plan covering employees represented by respondent union at one of petitioner's plants, and this plan contained a clause limiting benefits, upon termination of the plan, to the assets in the pension fund. Petitioner, upon closing such plant, terminated the pension plan the day before January 1, 1976, the date on which much of ERISA became effective, at which time the pension fund assets were sufficient to pay only about 35% of the vested benefits to those employees entitled thereto. Petitioner thereafter filed an action against the PBGC in Federal District Court seeking a declaration that it has no liability under ERISA for any failure of the pension plan to pay all of the vested benefits in full, and an order enjoining the PBGC from taking actions inconsistent with that declaration. Granting summary judgment for petitioner, the District Court held that the limitation of liability clause in the plan was valid on the date of termination and that such clause prevented the benefits at issue from being characterized as "nonforfeitable." The Court of Appeals reversed, concluding, in reliance on the Title I definition of "nonforfeitability," that the limitation of liability clause merely

affected the extent to which the benefits could be collected, without qualifying the employees' rights against the plan.

Held: The plan's limitation of liability clause does not prevent the vested benefits from being characterized as "nonforfeitable" and thus covered by the insurance program. Petitioner's argument that the Title I definition of "nonforfeitable" determines which benefits are insured under Title IV, that thus benefits are not insured unless they are "unconditional" and "legally enforceable against the plan," that because of the limitation of liability clause such elements of the definition are not satisfied, and that therefore the benefits are forfeitable and necessarily uninsurable, is without merit. Such argument is not supported by a literal reading of the definition on which it relies, and it is inconsistent with the clear language, structure, and purpose of Title IV. Pp. 370–386.

(a) To view the term "nonforfeitable" as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect is consistent with the Title I definition of such term and accords with the interpretation of the term in Title IV adopted by the PBGC, the agency responsible for administering the Title IV insurance program. Pp. 370–374.

(b) There is no evidence that Congress intended to exclude otherwise vested benefits from the insurance program solely because the employer had disclaimed liability for any deficiency in the pension fund. To the contrary, § 4062 (b), the reimbursement provision, makes it clear that Congress was not only worried about plan terminations resulting from business failures but was also concerned about the termination of underfunded plans, such as the one here, by solvent employers. And the fact that the provision of § 4062 (b) limiting the amount of employer liability for reimbursement to 30% of the employer's net worth would be meaningless unless the employer has disclaimed direct liability demonstrates that Congress did not intend such a disclaimer to render otherwise vested benefits "forfeitable" within the meaning of § 4022. Pp. 374–382.

(c) Petitioner's proposed construction of the statute, whereby cost-free terminations of pension plans would be authorized prior to January 1, 1976, with full liability for all promised benefits thereafter, would distort the orderly phase-in of the statutory program designed by Congress. It appears that Congress intended to discourage unnecessary terminations even during the phase-in period and to place a reasonable ceiling on the potential cost of a termination during the principal life of ERISA—the period after January 1, 1976. Pp. 382–386.

592 F. 2d 947, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which WHITE, POWELL, and REHNQUIST, JJ., joined, *post*, p. 386. POWELL, J., filed a dissenting opinion, *post*, p. 396.

Robert W. Gettleman argued the cause for petitioner. With him on the briefs were *Lawrence R. Levin, Joel D. Rubin,* and *H. Debra Levin.*

Henry Rose argued the cause for respondent Pension Benefit Guaranty Corporation. With him on the brief were *Mitchell L. Strickler* and *George Kaufmann. M. Jay Whitman* argued the cause for respondent International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. With him on the brief was *John A. Fillion.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

On September 2, 1974, following almost a decade of studying the Nation's private pension plans, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.* As a predicate for this comprehensive and reticulated statute,[1] Congress made de-

**Thomas C. Walsh* and *Juan D. Keller* filed a brief for Concord Control, Inc., as *amicus curiae* urging reversal.

George J. Pantos, Otis M. Smith, and *David M. Davis* filed a brief for General Motors Corp. as *amicus curiae* urging affirmance.

[1] Title I of ERISA, § 2 *et seq.*, 29 U. S. C. § 1001 *et seq.*, requires administrators of all covered pension plans to file periodic reports with the Secretary of Labor, mandates minimum participation, vesting and funding schedules, establishes standards of fiduciary conduct for plan administrators, and provides for civil and criminal enforcement of the Act. Title II, ERISA § 1001 *et seq.*, amended various provisions of the Internal Revenue Code of 1954 pertaining to qualification of pension plans for special tax treatment, in order, among other things, to conform to the standards set forth in Title I. Title III, ERISA §§ 3001–3043, 29 U. S. C. § 1201 *et seq.*, contains provisions designed to coordinate enforcement efforts of different federal departments, and provides for further study of the field. And, most relevant in this case, Title IV, ERISA §§ 4001–4082, 29 U. S. C. § 1301 *et seq.*, created the Pension Benefit Guaranty Corporation (PBGC)

tailed findings which recited, in part, "that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; [and] that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits. . . ." ERISA § 2 (a), 29 U. S. C. § 1001 (a). As one of the means of protecting the interests of beneficiaries, Title IV of ERISA created a plan termination insurance program that became effective in successive stages. The question in this case is whether former employees of petitioner with vested interests in a plan that terminated the day before much of ERISA became fully effective are covered by the insurance program notwithstanding a provision in the plan limiting their benefits to the assets in the pension fund.

Stated in statutory terms, the question is whether a plan provision that limits otherwise defined, vested benefits to the amounts that can be provided by the assets of the fund prevents such benefits from being characterized as "nonforfeitable" within the meaning of § 4022 (a) of ERISA, 29 U. S. C. § 1322 (a).[2] If the benefits are "nonforfeitable," they are insured by the Pension Benefit Guaranty Corporation (PBGC) under Title IV.[3] And if insurance is payable to the

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and a termination insurance program to protect employees against the loss of "nonforfeitable" benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full.

[2] That section provides, in part:

"Subject to the [dollar] limitations contained in subsection (b) [see n. 23, *infra*], the [PBGC] shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 4021 applies to it." 88 Stat. 1016.

[3] Section 4002 (a), 88 Stat. 1004, 29 U. S. C. § 1302 (a), provides:

"There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this title, the corporation shall be administered by the chairman of the board of directors in accordance with poli-

former employees, the PBGC has a statutory right under § 4062 (b) to reimbursement from the employer.[4] It was petitioner's interest in avoiding liability for such reimbursement that gave rise to this action for declaratory and injunctive relief.

The relevant facts are undisputed. In 1960, pursuant to a collective-bargaining agreement, petitioner established a pension plan covering employees represented by the respondent union at its Chicago plant. The plan, as amended from time to time, provided for the payment of monthly benefits computed on the basis of age and years of service at the time of retirement.[5] Benefits became "vested"—that is to say, the

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cies established by the board. The purposes of this title, which are to be carried out by the corporation, are—

"(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

"(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies, and

"(3) to maintain premiums established by the corporation under section 4006 at the lowest level consistent with carrying out its obligations under this title."

[4] Section 4062 (b), 88 Stat. 1029, 29 U. S. C. § 1362 (b), provides in part:

"Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

"(1) the excess of—

"(A) the current value of the plan's benefits guaranteed under this title on the date of termination over

"(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

"(2) 30 percent of the net worth of the employer. . . ."

In other words, the employer must reimburse the PBGC for payments made from PBGC funds to cover nonforfeitable benefits to the extent that the pension fund was unable to pay them, but in no event is the employer liable to the PBGC for more than 30% of its net worth.

[5] Like the plan described in *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 593, n. 18, "[p]etitioner's plan is a 'defined benefit' plan, under which

employee's right to the benefit would survive a termination of his employment—after either 10 or 15 years of service. The 15-year vesting provisions would not have complied with the minimum vesting standards in Title I of ERISA that were to become effective on January 1, 1976,[6] the day after termination of the plan.

Petitioner agreed to, and did, make regular contributions sufficient to cover accruing liabilities, to pay administrative expenses, and to amortize past service liability over a 30-year period.[7] Consistent with the agreement and with accepted actuarial practice, it was anticipated that the plan would not be completely funded until 1990.

Petitioner retained the right to terminate the plan when the collective-bargaining agreement expired merely by giving 90 days' notice of intent to do so. The agreement specified that upon termination the available funds, after payment of expenses, would be distributed to beneficiaries, classified by age and seniority, but only to the extent that assets were

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the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." ERISA's termination insurance program does not apply to defined contribution plans, see § 4021 (b)(1), 29 U. S. C. § 1321 (b)(1), for the reason that under such plans, by definition, there can never be an insufficiency of funds in the plan to cover promised benefits.

[6] ERISA § 211 (b)(2), 29 U. S. C. § 1061 (b)(2). The provision for vesting of normal and early retirement rights after 10 years of service would have complied with the new standards unless, as petitioner argues, the clause disclaiming direct liability of the employer for benefits not sufficiently covered by the pension fund prevented the benefits from being "nonforfeitable" within the meaning of ERISA § 3 (19), 29 U. S. C. § 1002 (19). See discussion in n. 10, and Part III, *infra*, at 384–385.

[7] Persons employed by the company when the plan was created were entitled to credit for their prior years of employment in calculating both their eligibility for pensions and the amount of their benefits on retirement.

available. The critical provision of the agreement, Art. V, § 3, stated:

> "Benefits provided for herein shall be only such benefits as can be provided by the assets of the fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." App. 24.[8]

In 1975 petitioner decided to close its Chicago plant. Its collective-bargaining agreement expired on October 31, 1975, and it terminated the pension plan covering the persons employed at that plant on December 31, 1975, the day before ERISA would have required significant changes in at least the vesting provisions of the plan. At that time 135 employees had accrued benefits with an average value of approximately $77 per month. Those benefits were concededly "vested in a contractual sense."[9] The assets in the fund were sufficient to pay only about 35% of the vested benefits.

In 1976 petitioner filed an action against the PBGC, seeking a declaration that it has no liability under ERISA for any failure of the plan to pay all of the vested benefits in full,

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[8] By quoting only the first of these two sentences, MR. JUSTICE STEWART's dissenting opinion creates the impression that this provision is part of the plan's definition of benefits. Reading the two sentences together, however, makes it clear that the provision is simply a typical disclaimer of employer liability for any deficiency in the assets of the fund.

MR. JUSTICE STEWART's dissenting opinion quotes at length from Art. X, § 3, the plan provision determining the order of distribution of fund assets upon termination. *Post*, at 389–390, n. 7. Again, that provision does not purport to be a part of the definition of benefits, but simply provides a schedule for the distribution of benefits upon termination. Moreover, the dissent is quite wrong in stating that this distribution provision may have become illegal after December 31, 1975, *post*, at 390, n. 8. If that provision has been superseded, it was by § 4044, 29 U. S. C. § 1344, see n. 32, *infra*, which became effective on September 2, 1974.

[9] Brief for Petitioner 28.

and an order enjoining the PBGC from taking actions inconsistent with that declaration. The District Court accepted petitioner's contentions that the limitation of liability clause in the plan was valid on the date of termination, that the clause prevented the benefits at issue from being characterized as "nonforfeitable," and that petitioner was therefore entitled to summary judgment. 436 F. Supp. 1334 (ND Ill. 1977).

The Court of Appeals for the Seventh Circuit reversed. 592 F. 2d 947 (1979). Relying on the definition of "nonforfeitable" in Title I of ERISA,[10] the court concluded that the limitation of liability clause merely affected the extent to which the benefits could be collected, without qualifying the employees' rights against the plan. This conclusion was buttressed

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[10] The definition section of Title I, § 3, 88 Stat. 833, 836, 29 U. S. C. § 1002, provides that "[f]or purposes of this title:

. . . . . .

"(19) The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 203 (a)(3)."

Section 203 (a)(3), 29 U. S. C. § 1053 (a)(3), also part of Title I, provides that the right to accrued benefits shall not be treated as forfeitable merely because the plan provides that they are not payable under certain specified conditions, such as the death or temporary re-employment of the participant. None of the listed conditions relates to insufficient funding.

Section 203 (a) is a central provision in ERISA. It requires generally that a plan treat an employee's benefits, to the extent that they have vested by virtue of his having fulfilled age and length of service requirements no greater than those specified in § 203 (a)(2), as not subject to forfeiture. A provision in a plan which purports to sanction forfeiture of vested benefits for any reason, other than one listed in subsection (a)(3), would violate this section after January 1, 1976, its effective date. Thus, if we were to accept petitioner's argument that the limitation of direct liability clause renders the vested benefits forfeitable within the meaning of the Title I definition, that clause would be invalid after January 1, 1976.

by a comprehensive review of the legislative history in which Judge Sprecher noted that the words "vested" and "nonforfeitable" had been used interchangeably throughout the congressional reports and debates, that the specific purpose of Title IV insurance was to protect employees from the kind of risk presented here (insufficient funds in the plan to cover vested benefits at termination), and that a contrary holding "would totally subvert the Congressional intent." [11]

Having construed the statute as it did, the Court of Appeals was required to confront petitioner's constitutional argument that the imposition of a retroactive liability for the payment of unfunded, vested benefits that was not assumed under the collective-bargaining agreement, violates the Due Process Clause of the Fifth Amendment. The Court of Appeals agreed that ERISA was not wholly prospective in that it applies to pension plans in existence before the effective date of the Act. It concluded, however, that Congress had adequately tempered the Act's burdens on employers and that those burdens were sufficiently justified by the public purposes supporting the legislation.[12]

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[11] 592 F. 2d, at 958.

[12] "Perhaps the most important facts distinguishing ERISA from the Minnesota statute in *Allied Structural Steel* [*Co.* v. *Spannaus*, 438 U. S. 234,] are those revealing the Congressional attempt to moderate the impact of the liability imposed. Title IV provisions represent a rational attempt to impose liability only to the extent necessary to achieve the legislative purpose. Congress concluded that it was necessary to insure unfunded vested benefits and established a federal corporation for that purpose. However, it was also determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding. III Legislative History at 4741 (remarks of Sen. Williams); II Legislative History at 3382 (remarks of Rep. Gaydos). Congress was also concerned that without the risk of liability, employers might use promises of higher retirement benefits for bargaining leverage, knowing that the PBGC would be required to fulfill the promise. S. Rep. No. 93–383, I Legislative History at 1155. It was also believed that to impose liability

The petition for certiorari sought review of both the constitutional question and the question whether the statute had been properly construed to impose continuing liability on an employer that had lawfully terminated its plan prior to the effective date of the minimum vesting standards contained in Title I of ERISA. We granted certiorari, but limited our review to the statutory question. 442 U. S. 940.

Petitioner urges us to adopt a construction of the statute that would avoid the necessity of confronting constitutional questions,[13] and correctly points out that new rules applying

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would cause employers to assume a more responsible funding schedule. II Legislative History at 1873 (remarks of Sen. Griffin). These first two considerations would not have been relevant in the Minnesota scheme because no agency was established to assume primary responsibility for the payment of benefits.

"Acknowledging that employers on the verge of bankruptcy would be unlikely to terminate pension plans solely to take advantage of termination insurance, Congress provided net worth limitations on the amount of potential liability. 29 U. S. C. § 1362. Congress also devised other provisions to temper the burdens imposed. Employers will not necessarily be liable for the full amount of benefits promised in the plan, since Congress set a level on the amount of benefits guaranteed. 29 U. S. C. § 1322 (b)(3). In Section 1323 Congress required the PBGC to provide optional insurance to an employer who desires to protect against this contingent liability. Finally, Title IV grants the PBGC discretion to arrange reasonable terms for the payment of liability. 29 U. S. C. § 1367. Thus Title IV of ERISA, unlike the statutes invalidated under Due Process or the Contract Clause does have 'limitations as to time, amount, circumstances, [and] need.' *W. B. Worthen Co.* v. *Thomas*, 292 U. S. [426,] 434. . . .

"The record supporting the enactment of ERISA, wholly unlike that present in *Allied Structural Steel*, demonstrates that 'the presumption favoring "legislative judgment as to the necessity and reasonableness of a particular measure"' *must* be allowed to govern here. 438 U. S., at 247. . . . *Turner Elkhorn Mining*, 428 U. S., at 18, 19 . . . ; *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 . . . (1955). Title IV of ERISA satisfies Nachman's rights to Due Process." 592 F. 2d, at 962–963 (footnotes omitted).

[13] See, *e. g.*, *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–569.

to pension funds "should not be applied retroactively unless the legislature has plainly commanded that result." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 721. But petitioner's argument for reversal relies primarily on the language of the statutory definition of "nonforfeitable" contained in Title I, see n. 10, *supra*. If the Title I definition determines which benefits are insured under Title IV, benefits are not insured unless they are "unconditional" and "legally enforceable against the plan." Since petitioner's plan expressly states that benefits "shall be only such benefits as can be provided by the assets of the fund," petitioner argues that those elements of the statutory definition are not satisfied. Therefore, the benefits are forfeitable and necessarily uninsurable. Thus, petitioner concludes, it is not liable to anyone under the statute for the fund's inability to cover all vested benefits. Petitioner submits that this result is consonant with Congress' decision to postpone the effective date of the minimum vesting and funding requirements of Title I until January 1, 1976. Petitioner interprets that postponement as having been intended, among other things, to allow employers the opportunity to avoid the harsh consequences of the statute's retroactive application by freely terminating their plans at any time prior to that date.

We must reject petitioner's argument. We first note that the plan provision on which petitioner relies, *supra*, at 365, read as a whole, merely disclaims direct employer liability and imposes no condition on the benefits. See n. 8, *supra*, and n. 17, *infra*. Thus, petitioner's argument is not supported by a purely literal reading of the definition on which it relies and is inconsistent with the clear language, structure and purpose of Title IV. Since we construe petitioner's plan as containing only an employer liability disclaimer clause, we cannot accept its statutory argument without virtually eviscerating Title IV as applied to plans terminating prior to January 1, 1976. Such a result not only would be contrary to the four-stage phase-in of the program of insurance and employer

liability designed by Congress, but also would impose an extraordinarily harsh and plainly unintended burden on employers by operation of Title I after that date. We first consider petitioner's textual argument divorced from the statute as a whole; we next examine the structure and history of Title IV; and we finally explain how petitioner's proposed construction would distort the orderly phase-in of the statutory program designed by Congress.

I

The statutory issue presented in the case is whether petitioner's employees' benefits are "nonforfeitable . . . under the terms of a plan" within the meaning of § 4022 (a) of the Act. See n. 2, *supra*. Petitioner concedes that its employees' benefits are "vested in a contractual sense." The question is whether such benefits were insured under Title IV when the plan was terminated even though the plan expressly provided that petitioner was not liable if the plan's assets were insufficient to cover them.

The key statutory term, "nonforfeitable benefits," is nowhere defined in Title IV. Petitioner relies on the definition of "nonforfeitable" in Title I, § 3 (19), see n. 10, *supra*. But definitions in that section are not necessarily applicable to Title IV, because they are limited by the introductory phrase, "For purposes of this title." [14] Nothing in the statute or its legislative history tells us why the Title I definition of "non-

[14] The argument that the definition of "nonforfeitable" in § 3 (19) is directly applicable only in Title I is reinforced by the fact that Title I definitions are occasionally expressly incorporated by reference in Title IV. See, *e. g.*, § 4021 (a) (1), 29 U. S. C. § 1321 (a) (1), which provides in part, "this section applies to any plan . . . which, for a plan year . . . is an employee pension benefit plan (as defined in paragraph (2) of section 3 of this Act). . . ." This specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force, though they may otherwise reflect the meaning of the terms defined as used in other Titles.

forfeitable" is not made expressly applicable to Title IV. The legislative history does disclose, however, that earlier versions of what finally emerged as the Title I definition would unquestionably have covered the benefits at stake in this litigation, and that those earlier versions applied to the entire Act including the termination insurance provisions.[15] If we assume that the original intent to have the definition apply to the entire statute survived the unexplained changes in the form of the definition, we should likewise assume that no change was intended in the substantive coverage of the insurance program. Indeed, as we shall demonstrate,[16] the latter assumption is supported by the legislative history. But even assuming, *arguendo,* that the Title I definition controls and even if the legislative history were less clear than it is, three aspects of the Title I definition itself refute petitioner's argument that the "nonforfeitable" character of a participant's rights should be determined by focusing on whether the employer is liable for any deficiency in the fund's assets.

First, the principal subject of the definition is the word "claim"; it is the claim to the benefit, rather than the benefit itself, that must be "unconditional" and "legally enforceable against the plan." It is self-evident that a claim may remain valid and legally enforceable even though, as a practical matter, it may not be collectible from the assets of the obligor.

Second, the statutory definition refers to enforceability against "the plan." The only practical significance of the contractual provision limiting liability is to provide protection

[15] For example, the bill originally introduced in the House defined "nonforfeitable pension benefit" as "a legal claim obtained by a participant or his beneficiary to that part of an immediate or deferred pension benefit, which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's service and is no longer contingent on continued service." H. R. 2, 93d Cong., 1st Sess., § 3 (20) (1973), 1 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess., 12 (Comm. Print 1976) (hereinafter Leg. Hist.).

[16] See nn. 24–27, *infra.*

for the employer. With or without such a clause, the pension fund could pay no more than the amount of assets on hand. Giving the employer protection against liability does not qualify the beneficiary's rights against the plan itself.[17]

Third, the term "forfeiture" normally connotes a total loss in consequence of some event rather than a limit on the value of a person's rights. Each of the examples of a plan provision that is expressly described as not causing a forfeiture listed in § 203 (a)(3), see n. 10, *supra*, describes an event—such as

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[17] The dissenting opinions rely entirely on the form of the contractual provision protecting the employer against liability beyond its agreed contributions. Thus, if instead of stating that the benefits "shall be only such benefits as can be provided by the assets of the fund" the plan had said the benefits "shall only be recoverable from the assets of the fund," the dissenters would presumably agree that the benefits would be insured under Title IV. Nothing in the statute or its legislative history suggests that Congress intended the rights of the employees to hinge on any such purely formal difference between two plan provisions that would have precisely the same legal significance apart from the statute.

Indeed, under the dissenters' reading of the plan provision, insurance coverage would be unavailable regardless of the reason for the fund's inability to pay the vested benefits in full; whether the shortage resulted from insolvency of the employer, a defalcation by the trustees of the fund, or the unilateral termination before the plan was fully funded, Title IV insurance would be simply unavailable.

In the text, we explain at length why a clause limiting an employer's liability does not make otherwise vested benefits forfeitable within the meaning of the Act. The dissenters do not question the validity of any part of that explanation. Since what MR. JUSTICE STEWART describes as an "asset-sufficiency limitation," *post*, at 391, in the context of this case, is merely an example of such a clause, our explanation applies with full force to that formulation. Merely to assert that there is a "world of difference" between two forms of *employer* protection—without considering whether there is any reason to believe Congress intended such a difference to govern the availability of insurance protection for *employees*—is an unacceptable approach to the problem of statutory construction presented by this case. Understandably, the dissenting opinions do not suggest that there is anything in the legislative history of ERISA to support the view that the availability of insurance coverage should turn on the form of a plan provision disclaiming employer liability for unfunded benefits.

death or temporary re-employment—that might otherwise be construed as causing a forfeiture of the entire benefit. It is therefore surely consistent with the statutory definition of "nonforfeitable" to view it as describing the quality of the participant's right to a pension rather than a limit on the amount he may collect.

This reading of the Title I definition accords with the interpretation of the term "nonforfeitable" in Title IV adopted by the agency responsible for administering the Title IV insurance program. The PBGC has promulgated regulations containing a completely unambiguous definition of the term [18] and has been paying benefits to over 12,000 participants in terminated plans on the basis of this understanding of its statutory responsibilities.[19] We surely may not reject this

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[18] The definition promulgated by the PBGC states that "a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, [or] the completion of a required waiting period. . . ." 29 CFR § 2605.6 (a) (1979).

Petitioner all but concedes that it loses if this definition accurately reflects the meaning of "nonforfeitable" in Title IV. Petitioner argues, in a footnote in its brief, that the word, "payable," modifies "benefit" in such a way as to exclude the benefits under its plan since liability of the employer to pay them was expressly disclaimed. If that is what the PBGC intended when it promulgated its definition, it has certainly chosen a strangely vague manner of making that intent known.

[19] The Treasury Department's definition of "nonforfeitable," 26 CFR § 1.411 (a)–4 (a) (1979), provides in part:

"Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation."

Because we read petitioner's plan as containing only an employer liability disclaimer clause, this case is clearly governed only by the second quoted

contemporary construction of the statute by the PBGC [20] without a careful examination of Title IV and its underlying legislative history to see what benefits Congress intended to insure.

II

One of Congress' central purposes in enacting this complex legislation was to prevent the "great personal tragedy" [21] suffered by employees whose vested benefits are not paid when pension plans are terminated.[22] Congress found "that owing

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sentence of the regulation. Moreover, we assume this accords with the Treasury Department's views, since the PBGC's brief was approved by the Treasury Department. See also n. 36, *infra*. Of course, a provision in a plan which is construed as a condition, the failure of which would cause a forfeiture, would be invalid after January 1, 1976. See n. 10, *supra*.

[20] Cf., *e. g., E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U. S. 46, 55.

[21] The quotation is from a statement by Senator Bentsen, the member of the Senate Committee on Finance most active in sponsoring ERISA, reprinted in 3 Leg. Hist. 4793.

[22] See, *e. g.*, the following statement by Senator Williams, a sponsor of the Senate version of ERISA:

"Another reason why so many employees have found their pension expectations to be illusory is that the employer may shut down, and if there are insufficient funds to meet the vested claims of the participants, they have no recourse.

"A classic case, of course, is the shutdown of Studebaker operations in South Bend, Ind., in 1963, with the result that 4,500 workers lost 85 percent of their vested benefits because the plan had insufficient assets to pay its liabilities.

"While this was a spectacularly tragic instance, it was by no means unique. Last year, for example, P. Ballantine and Sons, a substantial contributor to a multiemployer plan, sold its operations and withdrew from the plan.

"Because the plan did not have sufficient assets to cover vested liabilities, several hundred employees, with as many as 30 years service, will lose a substantial portion of their vested benefits.

"These, of course, are by no means isolated cases. According to a recently-issued study by the Departments of Labor and Treasury, over 19,000 workers lost vested benefits last year because of the termination of insufficiently funded plans." 2 Leg. Hist. 1599–1600.

to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." ERISA § 2 (a), 88 Stat. 832, 29 U. S. C. § 1001 (a). Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it. The termination insurance program is a major part of Congress' response to the problem. Congress provided for a minimum funding schedule and prescribed standards of conduct for plan administrators to make as certain as possible that pension fund assets would be adequate. But if a plan nonetheless terminates without sufficient assets to pay all vested benefits, the PBGC is required to pay them—within certain dollar limitations not applicable here— [23] from funds established by that corporation.

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[23] Section 4022 (b)(3), 88 Stat. 1017, 29 U. S. C. § 1322 (b)(3), provides:

"The amount of monthly benefits described in subsection (a) provided by a plan, which are guaranteed under this section with respect to a participant, shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

"(A) his average monthly gross income from his employer during the 5 consecutive calendar year period (or, if less, during the number of calendar years in such period in which he actively participates in the plan) during which his gross income from the employer was greater than during any other such period with that employer determined by dividing $\frac{1}{12}$ of the sum of all such gross income by the number of such calendar years in which he had such gross income, or

"(B) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under section 230 of the Social Security Act) in effect at the time the plan terminates and the denomina-

Throughout the entire legislative history, from the initial proposals to the Conference Report, the legislators consistently described the class of pension benefits to be insured as "vested benefits." [24] Petitioner recognizes, as it must, that the terms "vested" and "nonforfeitable" were used synonymously.[25]

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tor of which is such contribution and benefit base in effect in calendar year 1974.

"The provisions of this paragraph do not apply to non-basic benefits."

In other words, Title IV generally limits guaranteed benefits to a worker's average monthly wage over the worker's best five years with the employer or $750 per month (adjusted for cost of living), whichever is lower. The last quoted sentence reflects that the PBGC is authorized to guarantee the payment of greater benefits, but is not required to do so. See § 4022 (c), 29 U. S. C. § 1322 (c).

[24] See, *e. g.*, S. Rep. No. 93–127, pp. 2, 24 (1973), 1 Leg. Hist. 588, 610; H. R. Rep. No. 93–533, pp. 2, 14, 25 (1973), 2 Leg. Hist. 2349, 2361, 2372; Summary of Differences between the Senate and the House Version of H. R. 2, pp. 7–9 (1974), in 3 Leg. Hist. 5213–5215; H. R. Conf. Rep. No. 93–1280, p. 368 (1974), 3 Leg. Hist. 4635: "Under the conference substitute [which was adopted by both Houses], vested retirement benefits guaranteed by the plan (other than benefits vesting only because of the termination) are to be covered to the extent of the insurance limitations. . . ." MR. JUSTICE STEWART's dissent acknowledges this language from the Conference Report, *post*, at 393, but draws an unsupportable inference from it. He emphasizes that it is only " 'vested retirement benefits *guaranteed by the plan*' " that are insured. The emphasized language was used by the Conference Committee, however, not to describe the nature of vested benefits that were to be insured under Title IV, but to distinguish the rejected narrower House provision, under which only those benefits that Title I of ERISA required to be vested would be insured. H. R. Conf. Rep. No. 93–1280, *supra*, at 368, 3 Leg. Hist. 4635. See also 592 F. 2d, at 954, n. 9. Thus, the quoted language, which tracks the language of § 4022 verbatim—except that "vested" is used in place of "nonforfeitable"—merely underscores the intent to insure all vested benefits.

[25] Brief for Petitioner 28–29: "the Congressional history shows the use of the word 'vested' interchangeably with the word 'nonforfeitable'. . . ."

See also the definition contained in S. 4 as reported on April 18, 1973, § 3 (26), 1 Leg. Hist. 494–495, which, when proposed, applied to the

Since Title IV neither uses nor defines the term "vested," [26] it is reasonable to infer that the term "nonforfeitable" was intended to describe benefits that were generally considered

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entire Act including the termination insurance provisions: "'Nonforfeitable right' or 'vested right' means a legal claim obtained to that part of an immediate or deferred life annuity which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's covered service under the plan, and is no longer contingent on the participant remaining covered by the plan."

In that same version of the bill, the predecessor of § 4022 stated that the "insurance program shall insure participants . . . against loss of benefits derived from vested rights. . . ." S. 4 § 402 (a), 1 Leg. Hist. 532.

There is no explanation in the legislative history for the substitution of "nonforfeitable" for "vested." Since it is clear from the remainder of the legislative history that "vested" benefits were to be insured, we view the substitution of "nonforfeitable" for "vested" as formal only. The Court of Appeals' explanation for the substitution is plausible: "The substitution of terms might be explained by reference to the testimony of members from the Department of Labor at the hearings. The Department testified in 1973 that 'there is a problem of defining the accrued benefit which will be insured. . . . [W]e probably need to get some consistency between accrued benefits definition for purposes of Internal Revenue as well as for purposes of termination insurance.' *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93rd Cong., 1st Sess., Part I at 437. Senator Bentsen responded with some interest in consistent definitions, although emphasizing it was vested benefits Congress intended to insure. *Id.*, at 443. The Internal Revenue Code used the word 'nonforfeitable,' rather than 'vested,' in its regulation of plan terminations pre-ERISA. *See* Treas. Reg. § 1.401–6 (1963)." 592 F. 2d, at 955, n. 10.

[26] There is a Title I definition of "vested liabilities," which provides that, "[t]he term 'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable." ERISA § 3 (25), 88 Stat. 837, 29 U. S. C. § 1002 (25). Although, as noted earlier, see n. 14, *supra*, Title I definitions are not directly applicable to Title IV, it suffices to say that the synonymous use of "vested" and "nonforfeitable" in this definition as well as throughout the legislative history does not make any easier petitioner's task of distinguishing the two terms for Title IV purposes.

"vested" prior to the statute. And it is clear that the normal usage in the pension field was that even if the actual realization of expected benefits might depend on the sufficiency of plan assets, they were nonetheless considered vested.[27]

There is no evidence that Congress intended to exclude otherwise vested benefits from the insurance program solely because the employer had disclaimed liability for any deficiency in the pension fund. Indeed, there is strong evidence to the contrary. Congress understood that pension plans ordinarily contained disclaimer provisions of the sort petitioner relies on here.[28] Given that understanding, the Title

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[27] "Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights:

" 'In a basic contradiction to the pure legal concept of vesting, the Benefit under a pension plan that is described as vested, is, in the usual case . . . contingent . . . upon survival . . . [and] upon the availability of assets in the plan. In principle, however, this is no different from some other types of vested property rights such as those embodied in bonds and promissory notes that may not be honored at maturity because of the financial condition of the promisor. In essence, therefore, the vesting of a pension benefit simply means that the realization of the benefit is no longer contingent upon the individual's remaining in the service of the employer to normal retirement age.'

"D. McGill, Preservation of Pension Benefit Rights, 6 (1972). See also Departments of Treasury and Labor, Study of Pension Plan Terminations 1972, 19 (1973)." 592 F. 2d, at 953–954.

[28] See S. Rep. No. 92–634, Interim Report of Activities of the Private Welfare and Pension Plan Study, 1971, Senate Committee on Labor and Public Welfare, p. 74 (1972): "Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make."

See also remarks of Representative Erlenborn, 2 Leg. Hist. 3388:

"At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time gen-

IV insurance program would have been wholly inapplicable to most pension plans. Since only the few plans in which the employer had not disclaimed liability would have been covered, the only purpose in providing any insurance at all would be to protect employees against the risk of employer insolvency.[29]

But § 4062 (b)(2), 29 U. S. C. § 1362 (b)(2), see n. 4, *supra*—the reimbursement provision—demonstrates that insolvency was certainly not the only focus of Congress' concern. The very fact that § 4062 (b)(2) requires employers to reimburse the PBGC for the payment of insured benefits makes it clear that Congress not only was worried about plan terminations resulting from business failures but also was concerned about the termination of underfunded plans by solvent employers.[30] Of even greater significance is the pro-

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erally has not made a promise to pay the pension, only to make periodic contributions."

Cf. S. Rep. No. 93–127, p. 10 (1973), 1 Leg. Hist. 596, noting that some "critics have proposed that corporate assets be committed to guarantee any pension obligations which exist at termination," which implies that the problem was largely due to the absence of any direct guarantee by the employer. That proposal was not adopted. Congress opted instead for the insurance system run by the PBGC, with limited employer liability over to the PBGC.

Cf. also Affidavit of Joseph E. Ellinger, Director of the Office of Program Operations of the PBGC: "Since September 2, 1974, the PBGC has assumed liability for approximately 136 insufficient pension plans terminating on or before December 31, 1975. . . . Of these plans, approximately 78 have limitation-of-liability provisions like the pension plan involved in this lawsuit." App. 74.

[29] Under petitioner's view, unless the employer is directly liable, the benefits are uninsured. Accepting that view, it would only be in a case in which an employer is insolvent that the insurance program would make any practical difference, since otherwise the employee could sue the employer directly.

[30] See remarks of Senator Williams following the conference, 3 Leg. Hist. 4741–4742: "Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the

vision limiting the amount of employer liability for reimbursement to 30% of the employer's net worth. The 30% limit plainly contemplates the situation in which the employer has disclaimed direct liability; for if the employer were directly liable to the employees for the full amount of any funding deficiency, the 30% limitation would serve no useful purpose.[31] That this 30% limit would be meaningless unless the employer has disclaimed direct liability surely demonstrates that Congress did not intend such a disclaimer to

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insurance program, notwithstanding their own financial ability to continue funding the plan, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefits paid by the corporation. This liability extends to 30 percent of the employer's net worth."

Congress was not acting in a vacuum. The threat of terminations of underfunded plans by solvent employers was quite real. In a 1972 study of pension plan terminations, published in 1973 by the Departments of the Treasury and Labor, it was reported, p. 55, that "the great majority of claimants with losses, including high-priority claimants, are in plans of employers whose net worth substantially exceeds benefit losses." Indeed, "[o]ver-all, only 3 percent of claimants with losses were in plans where employer net worth was less than the value of benefits lost while 71 percent of the claimants with losses were in plans where employer net worth was at least 1,000 percent of claimant losses." *Id.*, at 61. This study was repeatedly relied on by Congress. See, *e. g.*, S. Rep. No. 93-127, p. 10 (1973), 1 Leg. Hist. 596; remarks of Senator Williams, n. 22, *supra;* remarks of Representative Thompson, one of the House conferees on the final bill, 3 Leg. Hist. 4665.

The 30% limitation reflects the fear expressed during the debates that if too great a burden is placed directly on employers, growth of pension plans would be discouraged. See remarks of Representative Erlenborn, 2 *id.*, at 3403.

[31] If the employer pays the unfunded portion of the benefits, there would be no need for insurance and, of course, no need for any reimbursement at all. On the other hand, if the employer is liable to the employees but has insufficient assets to pay the full benefits, there obviously would be insufficient funds to reimburse the PBGC and the 30% limit would therefore be irrelevant.

render otherwise vested benefits "forfeitable" within the meaning of § 4022.[32]

Petitioner's reading of the statute would limit any meaningful application of the insurance program prior to January 1, 1976, to only those cases involving insolvent employers that had not disclaimed direct liability. Since the legislative history clearly shows that Congress intended to cover terminations by solvent employers, and further shows that disclaimer clauses were widely used, petitioner is ultimately contending that Congress did not intend to create any significant employer reimbursement liability prior to January 1, 1976. This argument, however, is foreclosed by a consideration of the statutory provisions for successive increases in the burdens associated with plan terminations. Congress clearly did not offer employers an opportunity to make cost-free terminations at any time prior to January 1, 1976. Quite the contrary, one

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[32] Another indication that benefits are not forfeitable within the meaning of Title IV solely because the employer has disclaimed direct liability is § 4044, 29 U. S. C. § 1344, which establishes the priority scheme for allocation of assets upon termination. The fifth priority is "all other nonforfeitable benefits under the plan." That implies that the four prior categories all involve nonforfeitable benefits as well, as one might expect. Subsection (b)(2) states the rule that if the assets "are insufficient to satisfy in full the benefits of all individuals [in any of the first four categories], . . . the assets shall be allocated pro rata among such individuals on the basis of present value (as of the termination date) of their respective benefits. . . ." Since this section thus contemplates that there may be insufficient funds in the plan to pay nonforfeitable benefits, it must be that benefits are not to be classified as forfeitable solely because there are insufficient funds to pay them. And it would make no sense administratively to provide for automatic pro rata distribution, as this section does, unless no additional funds are expected directly from the employer. If the employer is directly liable, it would make more sense to make any pro rata distribution after adding to the assets of the fund whatever funds could be gleaned directly from the employer. Therefore, this section indicates that Congress thought that benefits may be nonforfeitable even if an employer has disclaimed direct liability.

of the express purposes of ERISA was to discourage plan terminations. See n. 3, *supra*.

III

We have previously noted the care with which Congress approached the problem of retroactivity in ERISA. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S., at 721–722, n. 40. Congress provided that Title IV should have an increasingly severe yet carefully limited impact on employers during four successive periods of time for single-employer plans. During each of these periods, however, it extended the same insurance protection to those beneficiaries of terminated plans having vested benefits under the terms of the plans.

Title IV became effective as soon as ERISA was enacted on September 2, 1974, § 4082 (a), 29 U. S. C. § 1381 (a), and indeed was expressly made partially retroactive in order to provide insurance coverage to participants whose plans terminated after June 30, 1974, § 4082 (b), 29 U. S. C. § 1381 (b). The measure of coverage, at the outset, was the difference between the employee's vested benefits under the terms of the plan (subject to the dollar limitations in § 4022 (b)(3), see n. 23, *supra*) and the amount that could be paid from the terminated plan's assets. However, the employer liability provision, § 4062, was not made effective at all during this initial period—June 30 to September 2, 1974. The PBGC was thus given no right to recover any part of the insured deficiencies from employers that terminated their plans before the Act became effective.[33]

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[33] Since a disclaimer clause would protect an employer from liability to its employees, and since there was no contingent liability to the PBGC on account of terminations during this initial period in any event, it is difficult to identify a rational basis for conditioning the availability of plan termination insurance in this period on the absence of a disclaimer clause.

The second period lasted for 270 days after the enactment of ERISA, or until the end of May 1975. Again, the PBGC provided insurance coverage for most underfunded nonforfeitable benefits under the terms of a pension plan terminated during this period. But two important additional provisions became effective: § 4062 (b), the section creating employer liability to the PBGC, and § 4004 (f)(4), 88 Stat. 1009, 29 U. S. C. § 1304 (f)(4).[34] The latter authorized the PBGC to waive entirely, or to reduce, its right to recover insurance payments from any employer who could establish unreasonable hardship in situations in which the employer was not able, as a practical matter, to continue its plan in effect. Section 4004 (f)(4) unequivocally demonstrates that Congress had deliberately imposed a new liability upon an employer that terminated its plan during the first nine months of the operation of the Act. If the employer had a pre-existing contractual liability, there would have been no effective way for the PBGC to mitigate it in hardship cases, since the PBGC could not stop the employees from suing the employer directly. Moreover, there would have been no need for insurance except in cases of insolvency, and in such cases there would have been no practical reason for mitigation because recovery from the employer would have been impossible in any event. On the other hand, in the typical case in which the employer had protected itself from any contractual liability, the only possible source of employer liability was

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[34] "(f) In addition to its other powers under this title, for only the first 270 days after the date of enactment of this Act the corporation may—

. . . . .

"(4) waive the application of the provisions of sections 4062, 4063, and 4064 to, or reduce the liability imposed under such sections on, any employer with respect to a plan terminating during that 270 day period if the corporation determines that such waiver or reduction is necessary to avoid unreasonable hardship in any case in which the employer was not able, as a practical matter, to continue the plan."

§ 4062's provision for the recovery by the PBGC of insurance payments made on account of unsatisfied nonforfeitable benefits. Petitioner's definition of nonforfeitable benefits as excluding from Title IV coverage all benefits for which the employer is not directly liable would have made § 4004 (f)(4) totally inapplicable in the only cases in which it could have possibly made any difference.

The third period lasted for about seven months until December 31, 1975, the termination date of petitioner's plan. Having terminated more than 270 days after the Act became effective, petitioner was not eligible for a hardship waiver. Its contingent liability, however, was smaller than it would have been had it terminated its plan in the fourth period. During the third period, the terms of the pension plan still measured the outer limits of the unfunded liability. Had petitioner waited another day to terminate, Title I's vesting standards would have become effective, thereby increasing the number of employees whose benefits would have become vested, see n. 6, *supra*, and therefore insurable under Title IV. Petitioner avoided this additional liability by terminating in the third period.

Under petitioner's reading of the statute, there was a much more dramatic difference between the third period and the fourth period than we have just described. The argument that an employer liability disclaimer clause renders a plan's benefits forfeitable has two draconian consequences: first, it makes the Title IV insurance program entirely inapplicable to most terminations before January 1, 1976; second, it makes such disclaimer clauses entirely invalid on and after that date. This latter conclusion flows directly from Title I's command that all covered pension plans provide nonforfeitable benefits on and after January 1, 1976. See n. 10, *supra*.

But Congress plainly did not intend to prevent employers from limiting their potential direct liability to their em-

ployees. There is not a word in the statute or its legislative history suggesting that Congress ever intended to outlaw the use of such clauses.[35] On the contrary, the inclusion of a limit on an employer's contingent reimbursement liability to the PBGC measured by 30% of its net worth would be inexplicable if Congress had intended to deny employers any right to place a contractual limit on their direct liability to their employees. We stress that petitioner's construction of the statute would therefore render meaningless § 4062 (b)'s 30% net worth limit on the employer's contingent liability to the PBGC for all terminations occurring after January 1, 1976. In light of the careful attention paid to when various provisions were to be effective, Congress surely would have made explicit any intent to limit this important provision to a mere transitionary role. It bears emphasis that Congress declined to adopt the suggestion that corporate assets be committed to guarantee any pension obligations which exist at termination.[36] The 30% provision was designed as a softer measure.[37]

In sum, petitioner reads the statute as authorizing cost-free terminations prior to January 1, 1976, and full liability for all promised benefits thereafter with neither dollar nor

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[35] Indeed, since their use has unquestionably contributed to the growth of private pension plans, their prohibition would be inconsistent with Congress' repeatedly expressed intent to encourage the maintenance of pension plans.

[36] See n. 28, *supra*. The Internal Revenue Service has included an employer liability disclaimer clause in a model pension plan issued for guidance in drafting post-1976 plans. See CCH 1977 Pension Plan Guide ¶ 30,782.96.

[37] Further, under the reading of the statute we adopt, in the usual case an employer could not be liable for underfunded benefits beyond the dollar limitations on PBGC insurance payments. See n. 23, *supra*. But if an employer liability disclaimer clause were to be deemed invalid after January 1, 1976, those limits would not be applicable to protect the employer in lawsuits by employees brought directly against it.

net worth limitations. We are convinced that Congress envisioned a quite different scheme. Congress intended to discourage unnecessary terminations even during the phase-in period, and to place a reasonable ceiling on the potential cost of terminations during the principal life of the Act—the period after January 1, 1976. Although the impact of our holding on petitioner and others who lawfully terminated plans during the second half of 1975 may seem harsh, we have no doubt as to what Congress intended. We cannot give the statute a special reading for that brief period without distorting it for the remainder of its statutory life.

Accordingly, the judgment is

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join, dissenting.

Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1301 *et seq.*, establishes a system of insurance to cover the termination of private pension plans. Under that Title, the Pension Benefit Guaranty Corporation (PBGC) must "guarantee the payment of all nonforfeitable benefits . . . under the terms of a [covered] plan which terminates." [1] In turn, the PBGC may sue the company that maintained the plan for such part of the "guaranteed" payment as exceeded on the date of termination the value of the plan's assets.[2]

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[1] Title 29 U. S. C. § 1322 (a) more fully provides:

"[The PBGC] shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it."

Section 1322 (b) limits the amounts which the PBGC must so guarantee in respects not at issue here.

[2] 29 U. S. C. § 1362 (b)(1):

"Any employer [who maintained a plan at the time it was termi-

The Nachman plan was terminated on December 31, 1975, several months after Title IV had become fully applicable to pension plans such as the one maintained by the petitioner.[3] The issue in this case is, therefore, a narrow one: Whether, "under the terms of [the Nachman] plan," the plan's participants were entitled on the date of termination to "nonforfeitable benefits" in excess of the value of the funds that were then held by the plan.[4]

ERISA defines a "nonforfeitable benefit" as follows: [5]

"The term 'nonforfeitable' when used with respect to a

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nated, see § 1362 (a) and the exceptions provided therein] shall be liable to the corporation, in an amount equal to . . . —

"(1) the excess of—

"(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

"(B) the current value of the plan's assets allocable to such benefits on the date of termination. . . ."

A company's liability under § 1362 (b)(1) may not, however, exceed "30 percent of the net worth of the employer determined as of a day, chosen by the [PBGC] but not more than 120 days prior to the date of termination, computed without regard to any liability under this section." § 1362 (b)(2).

[3] See 29 U. S. C. § 1381 (a) ("The provisions of this subchapter take effect on September 2, 1974").

[4] If the answer to this inquiry is no, then under Title IV of ERISA the petitioner owes nothing to the PBGC. On the other hand, if the answer is yes, then the petitioner must pay the PBGC the amount by which the plan's "nonforfeitable benefits" exceeded on the termination date the value of the plan's assets, subject, of course, to the 30%-of-net-worth limitation contained in 29 U. S. C. § 1362 (b)(2) and the limitations set out in § 1322 (b).

[5] 29 U. S. C. § 1002 (19).

As the Court notes, § 1002 states that the definitions set out therein are "[f]or purposes of [Title I]." That the § 1002 (19) definition of "nonforfeitable benefit" is not expressly made applicable to Title IV appears, however, to be attributable to nothing but inadvertence. In the bill that passed the House and was sent to the Conference Committee, the minimum vesting provisions and the termination insurance provisions were

pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." [6]

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located under one Title. See H. R. 2, as passed by the House, 93d Cong., 2d Sess. (Table of Contents) (1974), 3 Leg. Hist. 3898–3899. The definition of "nonforfeitable" now contained in § 1002 (19) was made applicable to that entire Title. H. R. 2, § 3 (1974), 3 Leg. Hist. 3903. The Conference Committee split the minimum vesting provisions and the termination insurance provisions into two separate Titles. As the definitional section had always been situated at the front of the minimum vesting provisions, it naturally followed those provisions into Title I of the bill as enacted into law.

It would severely strain credulity to infer from these events that Congress decided to leave to pure chance the proper definition of "nonforfeitable" for purposes of Title IV. "Nonforfeitable" is used in Title I as a term of art. Congress used the same word in critical portions of Title IV. Had it intended "nonforfeitable" to carry one meaning in Title I and another in Title IV, Congress would presumably have said so, particularly since the two Titles were considered and enacted in tandem and were meant to function as an interrelated system of protection. Title IV, however, sets out no separate definition of "nonforfeitable," even though that Title does contain a few definitions of its own. Furthermore, the Act's legislative history reveals no suggestion that the word's import should differ as between Title I and Title IV.

It follows that, insofar as the PBGC's own definition of "nonforfeitable," see 29 CFR § 2605.6 (a) (1979), departs from § 1002 (19), it must be rejected. Nothing in the Act or its legislative history reflects a congressional intent to give the PBGC the authority to define the scope of its own entitlement to employer assets.

House and Senate bills and debates are reprinted, along with the House, Senate, and Conference Reports, in a three-volume Committee Print entitled Legislative History of the Employee Retirement Income Security Act of 1974, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess. (1976) (cited *supra* and hereafter as Leg. Hist.).

[6] The Court asserts that the language contained in § 1002 (19)—"which arises from the participant's service, which is unconditional, and which

No contention is made in this case that the benefits at issue did not arise from services rendered by the plan's participants. Rather, the petitioner's argument is that, in the words of the statute, "under the terms of [the Nachman] plan," the contested benefits were both "[c]onditional" and/or "legally [un]enforceable against the plan."

For present purposes, only two provisions of the now-terminated Nachman plan need be considered. First, a sentence in Art. V, § 3, stated: "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund." Second, Art. X, § 3, stated:

> "In the event of termination of the Plan, the assets then remaining in the Fund, after providing the accrued and anticipated expenses of the Plan and Fund . . . shall be allocated . . . *to the extent that they shall be sufficient*, for the purposes of paying retirement benefits. . . ." (Emphasis added.) [7]

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is legally enforceable against the plan"—modifies "claim" not "benefit." I disagree. The definition reads: "The term 'nonforfeitable' . . . means a claim . . . to *that part of a . . . benefit . . . which* arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." (Emphasis supplied.) But whether the operative language modifies "claim" or "benefit" would seem irrelevant for present purposes, in any event.

[7] Article X, § 3, of the Plan more fully provided:

"In the event of termination of the Plan, the assets then remaining in the Fund, after providing the accrued and anticipated expenses of the Plan and Fund, (including without limitation, expenses of terminating the Plan), shall be allocated by the Board [of Administration] on the basis of present actuarial values to the extent that they shall be sufficient, for the purposes of paying retirement benefits (the amount of which shall be computed on the basis of Credited Service to the date of termination of the Plan) in the following order or precedence:

"(a) To provide their retirement benefits to persons who shall have been Retired Employees and entitled to current benefits under the Plan prior to its termination, without reference to the order of retirement;

"(b) To provide Normal Retirement Benefits to Employees aged 65 or

These two provisions, neither of which was void on the date of termination,[8] rendered "conditional" every defined benefit set out in the plan. On termination, a participant's right to any benefit defined in dollar terms was expressly hinged on the plan's ability to pay that amount. Like any condition a plan might specifically place on a participant's entitlement to

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over on the date of termination of the Plan, without reference to the order in which they shall have reached age 65;

"(c) . . . .

"(d) . . . .

"(e) . . . .

"(f) . . . .

"*If, after having made provision in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for Employees in the next category, such benefits shall be provided for each such Employee on a pro-rata basis.*" (Emphasis added.)

Contrary to the Court's suggestion, nothing in 29 U. S. C. § 1344 (allocation of assets of terminated defined-benefit plans) operated in any way to void the asset-sufficiency language of this provision in the Nachman plan. Section 1344 simply changed the order in which the assets held by the Nachman plan had to be allocated on termination to the plan's participants.

[8] The provisions would have been illegal after December 31, 1975, to the extent that they conflicted with the "minimum vesting standards" that came into effect for plans like the Nachman plan on January 1, 1976. See 29 U. S. C. § 1061 (b)(2). Those standards mandate that covered pension plans provide their participants with specified levels of "nonforfeitable" benefits. See § 1053. All covered plans must, for instance, "provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." In addition, a covered plan must provide employees who have participated in the plan for certain periods of time with specified minimum "nonforfeitable" percentages of their accrued benefits.

The Nachman plan—as a "defined benefit plan," see 29 U. S. C. §§ 1002 (23), (34), (35); *Alabama Power Co.* v. *Davis*, 431 U. S. 581, 593, n. 18—could not, after January 1, 1976, have continued to promise its fully vested participants a "nonforfeitable" right only to that part of their "accrued benefit" which could be funded by the plan. See 29 U. S. C. §§ 1002 (23), (34), (35), 1053, 1054.

a defined retirement benefit, this asset-sufficiency condition deprived the Nachman plan's defined benefits of "nonforfeitable" status to the extent that such benefits could not be defrayed by the plan's assets.[9] The Court does not explain why an asset-sufficiency limitation expressly set out in a pension plan is not a "condition" for purposes of determining the "nonforfeitability" of the plan's pension benefits.[10]

By reason of the cited sentences in Art. V, § 3, and Art. X, § 3, it must also be concluded that the only defined benefits of the plan which on termination were "legally enforceable against the plan" were those that were fully funded. Under contract law, a person is liable only for that which he has promised to pay. The Nachman plan promised each participant that upon termination he would receive, not a particular retirement benefit defined in dollar terms, but rather such a benefit only if it could be funded out of the plan's assets.

The Court notes that another sentence in Art. V, § 3, of the plan provided that, "[i]n the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid." But this sentence had an entirely different effect from that of the two provisions discussed above. Since it only purported to limit the *employer's* liability to the plan and not the *plan's* obligation to the plan's participants, the sentence in question neither

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[9] As the Chairman of the House Committee on Education and Labor explained with regard to an earlier bill's definition of "nonforfeitable" almost identical to that contained in 29 U. S. C. § 1002 (19) as finally enacted: "The definition of the term 'nonforfeitable' is intended to preclude *any* conditions to receipt of vested benefits other than those noted in the definition." 2 Leg. Hist. 3306 (statement of Rep. Perkins) (emphasis supplied).

[10] To the extent that the PBGC's own self-serving definition in 29 CFR § 2605.6 (a) (1979) points in a different direction, it conflicts with the statute and can be accorded no weight. See n. 5, *supra*.

made the benefits provided by the plan "[c]onditional" nor rendered them "legally [un]enforceable against the plan." The Court is, therefore, quite correct in concluding that the sentence in question did not render "forfeitable" any of the retirement benefits provided by the Nachman plan.[11] What the Court misses is the world of difference between the employer disclaimer clause and the provisions in the plan that limited what the plan itself promised to provide its participants. Only the latter made the retirement benefits "forfeitable" for purposes of ERISA.[12]

Three aspects of ERISA's legislative history strongly support this interpretation of the statutory scheme. First, Congress discarded on its way to passing the Act a number of alternative definitions of the benefits to be insured, several of which if enacted would have read very much like the definition the PBGC has adopted and which the Court now holds embodies Congress' true intent.[13] Few principles of statu-

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[11] Correspondingly, I agree that the sentence did not affect in any way the petitioner's liability to the PBGC under 29 U. S. C. § 1362 (b). The sentence in question purported only to absolve the petitioner of liability to the plan's trustee for asset shortfalls. Had the sentence also attempted to protect the petitioner from its liability to the PBGC under § 1362 (b), it would presumably have been void to that extent.

[12] I also agree, however, with the Court's conclusion that nothing in ERISA *nullifies* clauses that protect employers from direct liability to plan participants for deficiencies in plan assets.

[13] For instance, the bill originally passed by the Senate insured retirement benefits that were "nonforfeitable" under the terms of the plan. H. R. 2, as passed by the Senate, 93d Cong., 2d Sess., § 422 (a) (1974), 3 Leg. Hist. 3702. Only one definition of "nonforfeitable" was contained in the bill. This provided that a "nonforfeitable benefit" was a benefit "which, notwithstanding any conditions subsequent which would affect receipt of any benefit flowing from such right, arises from the participant's covered service under the plan and is no longer contingent on the participant remaining covered by the plan." *Id.*, § 502 (a)(20), 3 Leg. Hist. 3745. See also S. 4, 93d Cong., 1st Sess., §§ 3 (26), 3 (35), 401 (b), 402 (a), 502 (a)(20) (1973) (bill as reported by Senate Committee on Labor and Public Welfare), 1 Leg. Hist. 494–495, 497, 532, 543; S. 4, 93d Cong., 1st

tory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 199–200.

Second, the Conference Report, in describing the bill that finally was enacted, stated that "vested retirement benefits *guaranteed by the plan* . . . are to be covered" by the Act's insurance scheme. H. R. Rep. No. 93–1280, p. 368 (1974), 3 Leg. Hist. 4635. (Emphasis added.) Only a benefit that is unconditionally promised by a plan is a benefit "guaranteed" by that plan.[14]

Third, Congress delayed the effective date of the Act's "minimum vesting standards" in order "to provide sufficient time for pension and profit-sharing retirement plans to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire. . . ." S. Rep. No. 93–127,

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Sess., §§ 3 (26), 3 (35), 401 (b), 402 (a), 502 (a) (20) (1973) (bill as originally introduced in Senate), 1 Leg. Hist. 103, 105, 137, 148.

Similarly, the bill reported to the House on October 2, 1973, by the House Committee on Education and Labor provided termination insurance for "vested liabilities." See H. R. 2, as amended, §§ 401 (b), 402 (a), 404 (b) (1973), 2 Leg. Hist. 2320, 2320–2321, 2325. Under the bill, "vested liabilities" were defined as "the present value of the immediate or deferred benefits available at regular retirement age for participants and their beneficiaries which are nonforfeitable and which are no longer contingent on continued service or any other obligation to the employer, sponsoring organization or other party in interest." H. R. 2, as amended, § 3 (25), 2 Leg. Hist. 2256. In turn, the bill defined "nonforfeitable benefit" as a benefit "which arises from the participant's service and is no longer contingent on continued service or any other obligation to the employer, sponsoring organization, or other party in interest." H. R. 2, as amended, § 3 (19), 2 Leg. Hist. 2251–2252.

[14] See also 3 Leg. Hist. 4668 (Rep. Dent) (Termination insurance "will provide a backup guarantee to every pension plan that, regardless of the economic fortunes of the companies sponsoring the plan, *its obligations* will be met." (Emphasis supplied.)).

p. 36 (1973), 1 Leg. Hist. 622. Disregarding this intent, the Court today effectively rewrites the Nachman plan to make it promise more than it actually did.

Nothing in the legislative history, on the other hand, truly supports the result reached by the Court. The Court relies on the fact that the terms "nonforfeitable" and "vested" were often used interchangeably in the legislative materials. This usage is said to be significant, because in the pension field a benefit is usually said to "vest" when a pension plan participant has fulfilled all the specified conditions for eligibility, such as age and length of service. The existence of other kinds of conditions, such as the sufficiency of the plan's assets, would not affect the determination of whether or not a benefit had "vested" in this traditional sense of the word.

But many of the statements in the legislative history relied upon by the Court were made in connection with proposed bills that were not enacted and whose express terms would have insured benefits "vested" in the traditional sense of the word. See n. 13, *supra*. These statements have no bearing on the present case, which concerns the construction of entirely different statutory language. Many of the other statements in the legislative history noted by the Court were made with respect to the bill that originally passed the House of Representatives, quite a different document from the bill that later emerged from the Conference Committee and was enacted into law as ERISA. The House bill provided that the insurance provision would cover only retirement benefits that were "nonforfeitable" by reason of the bill's minimum vesting standards. H. R. 2, as passed by the House, 93d Cong., 2d Sess., §§ 203, 409 (b)(1) (1974), 3 Leg. Hist. 3973–3979, 4024. See 2 *id.*, at 3293, 3347–3348 (explanation by Chairman of House Committee on Education and Labor). Under the legislation so proposed, there never would have been a time when the insurance scheme was in effect and a substantial portion of every plan's "vested" benefits were not also "nonforfeitable."

It was the Conference Committee that created the time gap

involved in this case (September 2, 1974, through December 31, 1975) during which pension plans were subject to the Act's insurance program but not to its minimum vesting standards. See H. R. Conf. Rep. No. 93–1280, pp. 48, 245 (1974), 3 Leg. Hist. 4323, 4515. In discussing the Conference Committee bill, certain Members of Congress also equated "vested" rights with "nonforfeitable" rights.[15] But there is no reason to suppose that these statements did not refer to the post-1975 operation of ERISA, when many benefits, "vested" in the traditional sense, also became "nonforfeitable" by reason of the Act's minimum vesting standards.[16]

Finally, contrary to the Court's assertion, the construction that I would give to the Act would not render meaningless the decision of Congress to make Title IV fully applicable as of September 2, 1974. That Title insured the following types of benefits provided by plans terminated between September 2, 1974, and December 31, 1975: (1) All benefits made ex-

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[15] See, *e. g.*, 3 Leg. Hist. 4734, 4735, 4741 (Sen. Williams); *id.*, at 4752, 4758 (Sen. Javits); *id.*, at 4800 (Sen. Nelson); *id.*, at 4678 (Rep. Ullman); *id.*, at 4694 (Rep. Brademas); *id.*, at 4702 (Rep. Tiernan).

[16] The Court's theory that the term "nonforfeitable" as used in ERISA means no more than "vested" in the traditional sense must fail on an additional account. According to the definition of "vested" cited by the Court, "the Benefit under a pension plan that is described as vested, is, in the usual case . . . contingent . . . upon survival . . . of the individual involved to the earliest date at which he can validly claim a pension. Thus, the right can be terminated by death. After retirement, each monthly payment is contingent upon survival of the individual. . . ." D. McGill, Preservation of Pension Benefit Rights 6 (1972). Under the Court's theory, therefore, a benefit that is contingent on survival is by definition "nonforfeitable." But were this the case, 29 U. S. C. § 1053 (a)(3)(A) would be wholly superfluous. That section provides that "[a] right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title)." The fact that Congress felt it necessary to include this provision in the Act must be given weight in determining the proper meaning of "nonforfeitable."

pressly "nonforfeitable" by the terms of plans in existence on January 1, 1974;[17] and (2) at least 20% of the benefits required by the Act's "minimum vesting standards" to be "nonforfeitable" under the terms of plans created after January 1, 1974.[18]

For all the reasons discussed, I respectfully dissent.

MR. JUSTICE POWELL, dissenting.

I join MR. JUSTICE STEWART's dissenting opinion and add only a brief word. The difference between the majority and dissenting opinions in this case turns almost entirely upon the construction of language in petitioner's pension plan. This plan is an agreement negotiated in good faith by the petitioner and the union representing employees covered by the plan. Everyone concedes that the plan is a valid contract enforceable according to its terms, except to the extent that ERISA provides otherwise. The petitioner lawfully terminated the plan on December 31, 1975.

It is perfectly clear, at least to me, that the plain language of the plan conditioned the employees' benefits in the event of termination upon the adequacy of the assets then remain-

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[17] For instance, had the Nachman plan simply not contained the provisions in Art. V, § 3, and Art. X, § 3, discussed above, it would have promised its participants a defined monthly benefit that was "nonforfeitable." The petitioner would then have been liable to the PBGC for whatever portion of those benefits were "guaranteed" by the PBGC pursuant to 29 U. S. C. § 1322 and exceeded the value of the plan's assets on termination. This liability would have been unaffected by the fact that a clause in the plan absolved the petitioner of any personal obligation to the plan's participants or to the plan's trustee.

[18] Title 29 U. S. C. § 1061 (a) provides that the "minimum vesting standards" of Title I of ERISA are applicable beginning September 2, 1974, to pension plans set up after January 1, 1974. Title 29 U. S. C. § 1322 (b)(8) states that "nonforfeitable" benefits provided by a plan that has been in effect for less than five years are "guaranteed" to the extent of 20% or $20 per month (whichever is greater) for each year of plan existence.

ing in the fund. If ERISA had not been enacted, the respondent Pension Benefit Guaranty Corporation acknowledges, the employees' benefits would have been limited by this condition. The respondent contends, however, that ERISA—and the respondent's own regulatory definition of "nonforfeitable"—require a construction of the plan that neither the petitioner nor its employees intended. I assume for present purposes that Congress could mandate this result. But in the absence of a clear expression of congressional intent, I would not conclude that Congress meant to alter contractual arrangements between private parties. For the reasons stated in the dissenting opinion, I find no such intent relevant to this case in either the ambiguous language of ERISA or its legislative history.

I add only that the decision today has little consequence beyond the resolution of this case. As I read the opinions, the decision affects only pension plans terminated on or before December 31, 1975, that contained language substantially identical to the language in petitioner's plan.

BUSIC *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-6020. Argued February 27, 1980—Decided May 19, 1980*

Upon their joint trial in Federal District Court, petitioners were convicted of, *inter alia*, armed assault on federal officers—petitioner LaRocca as the actual triggerman and petitioner Busic as an aider and abettor and thus derivatively a principal under 18 U. S. C. § 2—in violation of 18 U. S. C. § 111, which makes it unlawful to assault a federal officer and which provides for enhanced punishment when the assaulter "uses" a deadly weapon. In addition, LaRocca was convicted of using, and Busic of carrying, a firearm in the commission of the armed assault, in violation of 18 U. S. C. § 924 (c), which authorizes the imposition of enhanced penalties on a defendant who "uses" (§ 924 (c)(1)) or "carries" (§ 924 (c)(2)) a firearm while committing a federal felony. Each petitioner's sentence included 5 years on possession of firearms and the assault charges, and 20 years for the § 924 (c) violations. The Court of Appeals ultimately held that, while LaRocca's sentence could not be enhanced under both § 111 and § 924 (c)(1) for "using" a firearm, he could be sentenced under either at the Government's election, but that, since the § 924 (c) charge against Busic alleged not that he "used" a firearm but rather that he "carried" one, his sentence was valid.

Held: Section 924 (c) may not be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. The sentence received by such a defendant may be enhanced only under the enhancement provision in the statute defining the felony he committed. Pp. 403–411.

(a) This result is supported not only by *Simpson* v. *United States*, 435 U. S. 6, but also by the legislative history of § 924 (c) and the canons of statutory construction that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, and that a more specific statute (18 U. S. C. § 111 here) will be given precedence over a more general one (§ 924 (c)), even if, as here, the general provision was enacted later. To the extent that this construction may lead to irrational sentencing patterns in which some less severe crimes are punished

*Together with No. 78-6029, *LaRocca* v. *United States*, also on certiorari to the same court.

more than other more severe crimes, it is the Congress, not this Court, that must take corrective action. Pp. 403–410.

(b) This holding not only makes it clear that petitioner LaRocca may not be sentenced under § 924 (c) (1) for using his gun to assault federal officers, but also applies to petitioner Busic's case. Nor can Busic's sentence be sustained by arguing that a person who *carries* a gun in the commission of a § 111 violation may be sentenced under § 924 (c) (2) because the enhancement provision of § 111 does not apply to those who *carry* but do not *use* their weapons. The fact is that Busic is being punished for *using* a weapon. Through the combination of § 111 and 18 U. S. C. § 2, he was found guilty as a principal of using a firearm to assault federal agents. Pp. 410–411.

587 F. 2d 577, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 412. STEWART, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 413. REHNQUIST, J., filed a dissenting opinion, *post*, p. 417.

Samuel J. Reich, by appointment of the Court, 444 U. S. 820, argued the cause and filed briefs for petitioner in No. 78–6020. *Gerald Goldman*, by appointment of the Court, 444 U. S. 1030, argued the cause and filed briefs for petitioner in No. 78–6029.

Mark I. Levy argued the cause for the United States in both cases. With him on the brief were *Solicitor General McCree, Assistant Attorney General Heymann*, and *Deputy Solicitor General Frey*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Title 18 U. S. C. § 924 (c) authorizes the imposition of enhanced penalties on a defendant who uses or carries a firearm while committing a federal felony. The question for decision in these cases is whether that section may be applied to a defendant who uses a firearm in the course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. We hold that the sentence received by such a defendant may be enhanced

only under the enhancement provision in the statute defining the felony he committed and that § 924 (c) does not apply in such a case.

I

Petitioners Anthony LaRocca, Jr., and Michael Busic were tried together on a multicount indictment charging drug, firearms, and assault offenses flowing from a narcotics conspiracy and an attempt to rob an undercover agent. The evidence showed that in May 1976 the two arranged a drug buy with an agent of the Drug Enforcement Administration who was to supply $30,000 in cash. When the agent arrived with the money, LaRocca attempted to rob him at gunpoint. The agent signalled for reinforcements, and as other officers began to close in LaRocca fired several shots at them. No one was hit and the agents succeeded in disarming and arresting LaRocca. Busic was also arrested and the officers seized a gun he was carrying in his belt but had not drawn. Additional weapons were found in the pair's automobile.[1]

A jury in the United States District Court for the Western District of Pennsylvania convicted petitioners of narcotics and possession-of-firearms counts,[2] and of two counts of armed assault on federal officers in violation of 18 U. S. C. § 111—LaRocca as the actual triggerman and Busic as an aider and abettor, and thus derivatively a principal under 18 U. S. C. § 2. In addition, LaRocca was convicted of using a firearm in the commission of a federal felony in violation of 18 U. S. C. § 924 (c)(1), and Busic was convicted of carrying a firearm in

[1] The facts are recited in the opinion of the United States Court of Appeals for the Third Circuit. 587 F. 2d 577, 579–580 (1978).

[2] The five narcotics counts alleged violations of 21 U. S. C. §§ 841 (a)(1), 843 (b), and 846. The firearms counts involving both petitioners charged violations of 26 U. S. C. §§ 5861 (c), 5861 (d), and 5871, and 18 U. S. C. §§ 922 (h) and 924 (a). LaRocca was named in six of these counts and Busic in five. In addition, Busic was convicted on three counts of unlawful firearms possession in violation of 18 U. S. C. App. § 1202 (a)(1). The indictment is reproduced at App. 5–15.

the commission of a federal felony in violation of 18 U. S. C. § 924 (c)(2).[3] Each petitioner was sentenced to a total of 30 years, of which 5 resulted from concurrent sentences on the narcotics charges, 5 were a product of concurrent terms on the firearms and assault charges, and 20 were imposed for the § 924 (c) violations.

The defendants appealed, contending, among other things, that they could not be sentenced consecutively for assaulting a federal officer with a dangerous weapon as defined in 18 U. S. C. § 111[4] and for the use of a firearm in connection with that crime as provided in § 924 (c).[5] In an opinion announced

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[3] The § 924 (c) counts on which the two were convicted recited as predicate felonies both the narcotics violations and the assaults on federal officers. In the courts below the Government attempted to support the § 924 (c) convictions in part by arguing that whatever their validity when superimposed on the assault charges, they could validly be grounded on the drug counts. The Court of Appeals rejected this contention, concluding that the jury might have found the drug conspiracy to have come to an end before the robbery and assault. 587 F. 2d, at 584, n. 5, and 588, n. 3. The Government does not press this argument in this Court, and we accordingly treat the cases as though the § 924 (c) charges recited only the assaults on federal officers as predicate felonies.

[4] Title 18 U. S. C. § 111 provides as follows:

"Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

"Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Among the persons designated in 18 U. S. C. § 1114 are officers or employees of the Drug Enforcement Administration.

[5] Title 18 U. S. C. § 924 (c) provides:

"Whoever—

"(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

"(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States[,]

"shall, in addition to the punishment provided for the commission of

before *Simpson* v. *United States*, 435 U. S. 6 (1978), was decided, the Court of Appeals for the Third Circuit concluded that the imposition in LaRocca's case of enhanced sentences under both § 924 (c) and § 111 for a single assault with a firearm violated the Double Jeopardy Clause of the Fifth Amendment because the two statutes required proof of identical elements. 587 F. 2d 577, 583–584 (1978). Accordingly, LaRocca's case was remanded to the District Court for resentencing under either § 111 or § 924 (c), at the Government's election. Since the § 924 (c) charge against Busic alleged not that he *used* a firearm (§ 924 (c)(1)), but rather that he *carried* one (§ 924 (c)(2)), the Court of Appeals held that no like infirmity invalidated his conviction and sentence. In its view, the § 111 and § 924 (c) charges against him did not require proof of the same elements and hence did not merge because the former could be established merely by showing that Busic had aided and abetted LaRocca's use of a gun to assault the federal officers, while the latter required proof of the additional fact that Busic had unlawfully carried a gun. 587 F. 2d, at 584.

Following this Court's decision in *Simpson* v. *United States*, *supra*, the Court of Appeals granted a petition for rehearing and vacated its double jeopardy holding with regard to LaRocca on grounds there was no reason to reach the constitutional question. 587 F. 2d, at 587–589. Thereafter, it proceeded as a matter of statutory construction to arrive at a nearly identical conclusion—namely, that LaRocca's sentence

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such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

could not be enhanced under both § 111 and § 924 (c) but that he could be sentenced under either at the Government's election. The Court of Appeals did not alter its holding with regard to Busic. We granted certiorari, 442 U. S. 916 (1979), and now reverse the enhanced sentences that were imposed on both petitioners under § 924 (c).

II

We turn first to the case of petitioner LaRocca because it poses most directly the key question of legislative intent. Our starting point, like that of the parties, is *Simpson, supra.* There we considered the relationship between § 924 (c) and the federal bank robbery statute, 18 U. S. C. § 2113, which, like the assault provision at issue here, 18 U. S. C. § 111, predates § 924 (c) and provides by its own terms for enhanced punishment where the felony is committed with a dangerous weapon.[6] Relying upon the legislative history and applicable canons of statutory construction, *Simpson* held that the Congress cannot be understood to have intended that a defendant who has been convicted of robbing a bank with a firearm may be sentenced under both § 924 (c) and § 2113 (d). The parties to the instant cases agree that *Simpson* clearly prohibits the imposition on these petitioners of similarly enhanced sentences under both § 924 (c) and § 111. But the Government contends that *Simpson* resolved only the double enhancement question—that the Court's holding and opinion should not be read to find § 924 (c) inapplicable where the prosecution proceeds under that provision *rather than* the enhancement provision of a predicate felony statute like § 111. Such a reading, the Government asserts, is supported by the facts presented in *Simpson,*[7] the language used to describe the

[6] For present purposes, §§ 2113 and 111 are fully analogous. Therefore, what *Simpson* held of the relationship between § 924 (c) and the one applies to that section's relationship with the other as well.

[7] Petitioners in *Simpson* had been sentenced under both enhancement provisions. 435 U. S., at 9.

actual "holding," [8] the most likely inferences that may be drawn as to what Congress would have wanted had it focussed on the precise problem,[9] and the asserted irrationality of some of the consequences that would flow from a holding that § 924 (c) is inapplicable in cases like the present cases.[10]

We disagree. In our view, *Simpson*'s language and reasoning support one conclusion alone—that prosecution and enhanced sentencing under § 924 (c) is simply not permissible where the predicate felony statute contains its own enhancement provision. This result is supported not only by the general principles underlying the doctrine of *stare decisis*—principles particularly apposite in cases of statutory construction—but also by the legislative history and relevant canons of statutory construction. The Government has not persuaded us that this result is irrational or depends upon implausible inferences as to congressional intent. And to the

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[8] *Simpson*'s final paragraph stated in part: "Accordingly, we hold that in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113 (d) and § 924 (c)." *Id.*, at 16.

[9] Section 924 (c) was enacted as part of the Gun Control Act of 1968 in the wake of the assassinations of Senator Robert F. Kennedy and Rev. Martin Luther King, Jr. It clearly was an attempt to take major steps to prevent firearm abuses. Thus, it is argued, it is unlikely that Congress would have wanted the severe penalties of § 924 (c) to be pre-empted by less stringent penalties provided in pre-existing enhancement provisions.

[10] For example, the Government notes that under such a holding a person who breaks into a Post Office in violation of 18 U. S. C. § 2115, which contains no enhancement provision, could receive an extra 10 years under § 924 (c) for using a gun to shoot the lock off. In contrast, the sentence of a person who draws a gun and fires a number of shots while robbing a bank could not be enhanced under that provision because the bank robbery statute's enhancement clause would take precedence. That clause, § 2113 (d), permits a sentence of up to 25 years, but even if he had not used a weapon this person could have received 20 years under § 2113 (a). Accordingly, the *incremental* penalty the bank robber can receive for using the firearm is only 5 years as opposed to 10 for the Post Office robber.

extent that cases can be hypothesized in which this holding may support curious or seemingly unreasonable comparative sentences, it suffices to say that the asserted unreasonableness flows not from *Simpson* and this decision, but rather from the statutes as Congress wrote them. If corrective action is needed, it is the Congress that must provide it. "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA* v. *Hill*, 437 U. S. 153, 185 (1978).

Our reasoning has several strands. It begins, as indeed it must, with the text and legislative history of § 924 (c). By its terms, that provision tells us nothing about the way Congress intended to mesh the new enhancement scheme with analogous provisions in pre-existing statutes defining federal crimes. Moreover, as *Simpson* noted, 435 U. S., at 13, and n. 7, § 924 (c) was offered as an amendment on the House floor by Representative Poff, 114 Cong. Rec. 22231 (1968), and passed on the same day. *Id.*, at 22248. Accordingly, the committee reports and congressional hearings to which we normally turn for aid in these situations simply do not exist, and we are forced in consequence to search for clues to congressional intent in the sparse pages of floor debate that make up the relevant legislative history. The crucial material for present purposes is the following observation by Representative Poff:

> "For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." *Id.*, at 22232.

Simpson pointed out that "[t]his statement is clearly probative of a legislative judgment that the purpose of § 924 (c) is

already served whenever the substantive federal offense provides enhanced punishment for use of a dangerous weapon." 435 U. S., at 13. Moreover, Representative Poff's remarks were the only ones touching on the present question that were before the House when § 924 (c) was adopted, and it is therefore reasonable to assume that they represent the understanding of the Congressmen who voted for the proposal.[11]

Reliance on Representative Poff's statement of legislative intent is consistent with the position taken by the Department of Justice in 1971 when it advised prosecutors not to proceed under § 924 (c)(1) if the predicate felony statute provided for " 'increased penalties where a firearm is used in the commission of the offense.' " *Simpson, supra,* at 16, quoting 19 U. S. Attys. Bull. No. 3, p. 63 (U. S. Dept. of Justice, 1971). Moreover, this view is fully consistent with two tools of statutory construction relied upon in *Simpson.* The first is the oft-cited rule that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *United States* v. *Bass,* 404 U. S. 336, 347 (1971), quoting *Rewis* v. *United States,* 401 U. S. 808, 812 (1971). And the second is the principle that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence. *Preiser* v. *Rodriguez,* 411 U. S. 475, 489–490 (1973). In *Simpson,* these principles counseled against double enhancement. They served as "an outgrowth of our reluctance to increase or multiply punishments absent

[11] This interpretation receives additional support from the fact that the Conference Committee chose the Poff version over a Senate proposal which, according to its sponsor, 114 Cong. Rec. 27142 (1968), would have permitted enhancement for the use of a firearm even where the predicate offense contained its own enhancement clause. H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 31–32 (1968). We recognize, as the Government points out, that the Senate version differed in other respects as well; but insofar as it points in any direction this chain of events supports reliance on the Poff statement.

a clear and definite legislative directive." 435 U. S., at 15–16. Here they play a similar role, and thus help confirm the conclusion that § 924 (c) may not be applied at all in the present situation.

The Government seeks to minimize the force of these principles of statutory construction by urging (1) that there is no ambiguity in § 924 (c) and thus that the rule of lenity is not properly called into play and (2) that in fact it is § 924 (c) that is the more specific statute because it relates only to firearms while § 111 would permit enhancement for any dangerous weapon. We find each contention flawed. As to the first, the claim that there exists no ambiguity does not stand up. Plainly the text of the statute fails to address the issue pertinent to decision of these cases—whether Congress intended (1) to provide for enhanced penalties only for crimes not containing their own enhancement provisions, (2) to provide an alternative enhancement provision applicable to all felonies, or (3) to provide a duplicative enhancement provision which would permit double enhancement where the underlying felony was proscribed by a statute like § 111. Our task here, as in *Simpson*, is to ascertain as best we can which approach Congress had in mind. The rule of lenity, like reference to appropriate legislative materials, is one of the tools we use to do so.

The Government's second contention—that § 924 (c) rather than § 111 should be viewed as the more specific statute—is both facially unpersuasive [12] and likely to lead to curious consequences. Indeed, were the Government correct we would be forced to conclude that with regard to firearms cases § 924 (c) impliedly repealed *all* pre-existing enhancement provisions. Yet there is not a shred of evidence to suggest that this is what Congress intended. Moreover, such a result

[12] Indeed, § 924 (c) is itself fairly broad. It refers to "firearms," a term defined in 18 U. S. C. §§ 921 (a)(3) and (4) to include bombs, grenades, rockets, mines, and similar devices in addition to guns.

would be inconsistent with *Simpson* [13] and in any event would not give the Government what it wants because it would not permit the prosecutor to choose between § 924 (c) and § 111.

In addition to contesting the rule of lenity and specific-versus-general arguments, the Government contends that our reading of the legislative materials is unreasonable because those who supported the Poff amendment—including Representative Poff himself—were clearly committed to meting out stiff penalties for use of a firearm in the course of a felony and would not have followed any course inconsistent with that commitment. The argument is overdrawn. In the first place, we do not think our construction is inconsistent with a congressional desire to deal severely with firearm abuses. As we understand it, the Government's argument is not that our construction reads Congress to have *diminished* the penalty for firearm use, but only that our construction fails to enhance that penalty to the hilt. Yet it is patently clear that Congress too has failed to enhance that penalty to the hilt—it set maximum sentences as well as a variety of other limits on the available punishment. Thus, while Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries.

More specifically, *some* accommodation between § 924 (c) and statutes like § 111 is obviously necessary. And since some pre-existing statutes provided for sentences less severe than § 924 (c) and others for penalties more severe,[14] any rule

[13] The disposition in *Simpson* was to remand for proceedings consistent with the opinion of the Court. On remand, the Court of Appeals vacated the § 924 (c) sentences and approved and affirmed those under § 2113 (d)—a disposition that would have been improper were the Government correct in its specificity argument.

[14] Section 924 (c) provides for maximum incremental penalties for use of a firearm of 10 years for a first offender and 25 years for a second offender. Under § 2113, the incremental penalty available for use of a dangerous weapon in the course of an otherwise forceful bank robbery is 5 years

of priority would lead in certain circumstances to a punishment less severe than might have been achieved under another rule of priority. The Government in effect argues that had Representative Poff and his colleagues foreseen this problem they would have eschewed any priority rule and instead rested complete discretion in the prosecutor. We do not dispute that a rule permitting prosecutors freedom of choice might give greater effect to a legislative desire to increase the penalties for firearm use, but the same could be said of any number of constructions of the statute, including the one rejected in *Simpson*. Indeed, by rejecting double enhancement *Simpson* exposes the stark and unidimensional quality of any calculus which attempts to construe the statute on the basis of an assumption that in enacting § 924 (c) Congress' sole objective was to increase the penalties for firearm use to the maximum extent possible.

The fact that the enhanced sentences authorized in some predicate felony statutes are greater than those set forth in § 924 (c) while those in others are less provides a partial response to the Government's contention that our construction would lead to irrational sentencing patterns in which some less severe crimes are punished more than other more severe ones.[15] The fact is that any interpretation might have led

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(25 years under § 2113 (d) less 20 years under § 2113 (a)), while the incremental penalty for using a weapon in the course of an otherwise nonviolent robbery is 15 years (25 years less 10 years under § 2113 (b)) if the goods taken are worth more than $100 and 24 years (25 years less 1 year) if the goods taken are worth less. And under 18 U. S. C. § 2114, another statute referred to by Representative Poff, the incremental cost to the defendant of using a gun to assault a person having custody of the mail or property of the United States is 15 years. Thus, a ruling making § 924 (c) pre-emptive would increase some incremental penalties while actually decreasing others. In contrast, the Poff rule merely leaves these penalties where they were set by Congress in the first place—it makes no existing firearm penalty smaller or larger.

[15] One of the Government's examples is described in n. 10, *supra*. The unlikeliness of the hypothetical and the fact that it compares only incre-

to differences in treatment that are not intuitively reasonable. In consequence, the presence of differences here fails to shake our confidence in our construction. More broadly, it is simply not for this Court to substitute its accommodation between old and new enhancement provisions for the one apparently chosen by Congress. On the contrary, "in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with 'common sense and the public weal.'" *TVA* v. *Hill*, 437 U. S., at 195.

III

What we have said thus far disposes of LaRocca's case by making it clear that he may not be sentenced under § 924 (c) for using his gun to assault the federal officers. This holding also applies in Busic's case. But in that case the Government has a fallback position. Even if a person who *uses* a gun to violate § 111 may not be sentenced for doing so under § 924 (c)(1), the argument goes, a person who *carries* a gun in the commission of a § 111 violation may be sentenced under § 924 (c)(2) because the enhancement provision of § 111 does not apply to those who *carry* but do not *use* their weapons. Thus, the Government urges, whatever our holding with regard to LaRocca, Busic may be sentenced under § 924 (c)(2) for carrying his gun while committing the crime of aiding and abetting LaRocca's violation of § 111.

The central flaw in this argument as applied here is that Busic *is* being punished for using a weapon. Through the combination of § 111 and 18 U. S. C. § 2, he was found guilty as a principal of using a firearm to assault the undercover agents.[16] LaRocca's gun, in other words, became Busic's as

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mental and not total penalties suggest that the possibility of genuinely troubling comparative sentences may be exaggerated.

[16] Title 18 U. S. C. § 2 provides in relevant part that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

a matter of law. And the Government's argument thus amounts to the contention that had Busic shot one gun at the officers and carried another in his belt he could have been punished under § 111 for the one he fired and under § 924 (c)(2) for the one he did not fire. Similarly, this argument would suggest, Busic might be punished for carrying a gun in his belt and also for shooting that same gun. Yet such results are wholly implausible. They would stand both *Simpson* and our holding in Part II, *supra*, on their heads, impute to Congress the unlikely intention to punish each weapon as a separate offense, and create a situation in which aiders and abettors would often be more culpable and more severely punished than those whom they aid and abet.[17] We decline to read the statutes to produce such an ungainly result. It seems to us that our holding of Part II is equally applicable here—Busic's vicarious assault and use of a dangerous weapon are subject to prosecution and punishment under § 111 and he has been duly prosecuted and punished pursuant to that provision. In such a case, *Simpson*, the legislative history, and applicable canons of statutory construction make it clear that neither subsection of § 924 (c) is available.[18]

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[17] On these facts, for example, the Government's view would permit Busic—the aider and abettor—to be sentenced under *both* § 924 (c) and § 111—while LaRocca—the triggerman—could be sentenced only under the latter. That this is so is a product not of our holding in Part II, but of the Government's theory itself. This is quite clear if one assumes for purposes of argument that LaRocca could have been punished under § 924 (c)(1) for using his gun. Were that the case, Busic, too would have been guilty of that crime as an aider and abettor. And the Government's argument here would lead to the conclusion that he could also be guilty of violating § 924 (c)(2) by carrying his own gun. In short, while he neither shot nor drew his gun, he would have been subject to fully twice the penalties that would have faced his more culpable comrade.

[18] Our result with regard to Busic flows as much from the logic and language of 18 U. S. C. § 2 as from anything peculiar to § 924 (c). Section 2 makes Busic punishable "as a principal," and those words mean

These cases are reversed and remanded to the Court of Appeals for proceedings consistent with this opinion.[19]

So ordered.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, holding that the decision in *Simpson* v. *United States*, 435 U. S. 6 (1978), leads to the conclusion that 18 U. S. C. § 924 (c) is inapplicable where a defendant is charged with committing a substantive federal offense violative of a statute that already provides for enhanced punishment for the use of a firearm.

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what they say. One consequence is that aiders and abettors may be held vicariously liable "regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted." S. Rep. No. 1020, 82d Cong., 1st Sess., 7 (1951). Another is that there will inevitably exist cases in which a decision to treat an aider and abettor as a principal may be inconsistent with prosecuting and punishing him as well for some of his individual acts of aiding and abetting. Phrased differently, once he has been treated as a principal some of his lesser acts in furtherance of the central violation may merge into it. On these facts, § 2 appears to require that we treat Busic as though he used LaRocca's gun to commit this assault. It would be incongruous to treat him at the same time as a separate individual punishable as though he had carried a different gun in the course of a different crime.

[19] The Government makes a conditional plea that should we find § 924 (c) to be inapplicable to these petitioners we vacate not only the § 924 (c) sentences, but also those imposed by the District Court under § 111. This, the Government urges, would permit that court to resentence petitioners under the enhancement provision of the latter statute. The argument is that the District Court intended to deal severely with the assaults in question and should not be prevented from doing so by its choice of the incorrect enhancement provision. The Court of Appeals has not considered this contention in this context and we are reluctant to do so without the benefit of that court's views. Accordingly, we express no opinion as to whether in the particular circumstances of these cases such a disposition would be permissible.

It should be made clear, however, that the Court of Appeals' initial opinion in these cases, discussed by the Court, *ante*, at 401–402, reflects the confusion that has existed among lower courts about the meaning of this Court's recent pronouncements respecting the multiple punishments aspect of the Double Jeopardy Clause. See *Whalen* v. *United States*, 445 U. S. 684, 697–698 (1980) (BLACKMUN, J., concurring in judgment). The Court of Appeals there rejected the view that Congress did not intend the enhancement provisions of § 924 (c) to apply when the substantive offense charged was 18 U. S. C. § 111. See 587 F. 2d 577, 581–582, and n. 3. The decision in *Simpson*, of course, revealed the error of that holding. But the Court of Appeals went on to hold that regardless of Congress' intent to provide for enhanced punishment in this context, the Double Jeopardy Clause prevented it from doing so, at least in certain cases. See *id.*, at 582–584. I do not subscribe to that view, and write separately only to state, once again, that it is my belief that when defendants are sentenced in a single proceeding, "the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Whalen* v. *United States*, 445 U. S., at 698 (BLACKMUN, J., concurring in judgment).

MR. JUSTICE STEWART, with whom MR. JUSTICE STEVENS joins, dissenting.

Under 18 U. S. C. § 924 (c), "[w]hoever—(1) uses a firearm to commit any [federal] felony . . . , or (2) carries a firearm unlawfully during the commission of any [federal] felony," is subject to a term of imprisonment in addition to that provided for the felony in question. In *Simpson* v. *United States*, 435 U. S. 6, which involved both § 924 (c)(1) and a felony proscribed by a statute that itself authorizes an enhanced penalty if a dangerous weapon is used, the Court held that Congress did not intend to authorize the imposition

of enhanced punishments for a single criminal transaction under both § 924 (c)(1) and the enhancement provision for the predicate felony. The Court today concludes that Congress not only did not intend to authorize the imposition of double enhancement, but also did not intend § 924 (c)(1) to apply at all to a felony proscribed by a statute with its own enhancement provision. I disagree. It is my view that § 924 (c)(1) was intended to apply to all federal felonies, though subject to the limitation in *Simpson* against double enhancement.

Congress enacted § 924 (c) as part of the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213. That legislation, enacted the year in which both Robert Kennedy and Martin Luther King, Jr., were assassinated, was addressed largely to the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." H. R. Rep. No. 1577, 90th Cong., 2d Sess., 7 (1968). A primary objective of § 924 (c), as explained by its sponsor, Representative Poff, was to "persuade the man who is tempted to commit a Federal felony to leave his gun at home." 114 Cong. Rec. 22231 (1968). Towards that end, § 924 (c) provides for a prison term, in addition to that provided for the underlying felony, of not less than 1 year nor more than 10 in the case of a first offender, and of not less than 2 years nor more than 25 in the case of a second or subsequent offender. It further provides that a sentence imposed under § 924 (c) is not to run concurrently with the sentence for the predicate felony and that, in cases of repeat offenders, the defendant cannot receive probation or a suspended sentence.

Before the enactment of § 924 (c), earlier Congresses had already authorized enhanced penalties for using a dangerous weapon in the commission of certain especially serious federal felonies, including assault on a federal officer, 18 U. S. C. § 111, and bank robbery, 18 U. S. C. §§ 2113 (a), (d). Those enhancement provisions authorize terms of imprisonment of

(1) not more than an additional seven years under § 111, and (2) not more than an additional five years under §§ 2113 (a), (d). Neither provision requires a mandatory minimum additional sentence or authorizes increased additional sentences for recidivists.

In *Simpson*, the Court held that Congress did not intend the imposition of enhanced punishments under both § 924 (c)(1) and the enhancement provision for a predicate felony. That conclusion found substantial support in the statement of Representative Poff on the House floor that "[f]or the sake of legislative history, it should be noted that my [bill] is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." 114 Cong. Rec. 22232 (1968).

The issue here is not that of double punishment, but instead whether the Government may obtain enhancement of punishment under § 924 (c)(1), rather than under the enhancement provision for the predicate felony. The Court today concludes that Congress did not intend § 924 (c)(1) to apply at all to a predicate felony proscribed by a statute with its own enhancement provision. It is thus the Court's view that the Government may obtain an enhanced sentence only under the enhancement provision for the underlying felony itself.

Although this conclusion finds support in certain passages in *Simpson* and in the literal terms of Representative Poff's statement on the House floor, it is not supported by the actual holding in *Simpson*, the language of the statute itself, or a fair appraisal of the intent of Congress in enacting § 924 (c). In *Simpson*, the Court decided only that "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced [to enhanced punishments] under *both* § 2113 (d) and § 924 (c)." 435 U. S., at 16 (em-

phasis added). The Court did not decide whether § 924 (c)(1) is available as an *alternative* enhancement provision. On this latter question, the statutory language is unambiguous, for § 924 (c)(1) provides, by its terms, for an enhanced penalty for "[w]hoever . . . uses a firearm to commit *any* [federal] felony." (Emphasis added.)

To be sure, Representative Poff stated that his bill "[was] not intended to apply" to certain felonies proscribed by statutes that contain their own enhancement provisions. But that statement could as easily have been directed to the question in *Simpson*—whether § 924 (c)(1) can be invoked *in addition to* a previously enacted enhancement provision—as to the question in this case—whether § 924 (c)(1) can be invoked *in lieu of* such a provision.

I agree with the holding in *Simpson* that Congress did not intend to "pyramid" punishments for the use of a firearm in a single criminal transaction. Yet I find quite implausible the proposition that Congress, in enacting § 924 (c)(1), did not intend this general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions for recidivists—to serve as an alternative source of enhanced punishment for those who commit felonies, such as bank robbery and assaulting a federal officer, that had been previously singled out by Congress as warranting special enhancement, but for which a lesser enhancement sanction than that imposed by § 924 (c) had been authorized. In the light of the expressed concerns of Congress in enacting the Gun Control Act of 1968 in general and § 924 (c)(1) in particular, it is far more reasonable to conclude that Congress intended § 924 (c)(1) to mean precisely what it says, namely, that it applies to any federal felony.

It is my view, in sum, that § 924 (c)(1) applies to all federal felonies, though subject to the limitation in *Simpson* against double punishment. Under this reading of the statute, the Government may obtain an enhanced sentence under either

§ 924 (c)(1) or the enhancement provision for the predicate felony, but not under both.

For the foregoing reasons, I dissent.*

MR. JUSTICE REHNQUIST, dissenting.

I dissented from this Court's decision in *Simpson* v. *United States*, 435 U. S. 6 (1978), and continue to believe that case was wrongly decided. Now, as then, I am quite amazed at this Court's ability to say that 18 U. S. C. § 924 (c) "tells us nothing about the way Congress intended to mesh the new enhancement scheme with analogous provisions in pre-existing statutes defining federal crimes," *ante*, at 405, even though that section provides quite clearly that the use of a firearm in the commission of "any felony" shall be punished by up to 10 years' imprisonment "in addition to the punishment provided for the commission of such felony. . . ." Nor do I find any more persuasive the Court's rehash of the legislative history of § 924 (c), including *Simpson*'s unwarranted reliance upon the remark of Representative Poff, a remark that the Court today labels "the Poff rule," see *ante*, at 409, n. 14, and that might more properly be labeled "the Poff amendment" (albeit not intended as such by its proponent).

Were *Simpson* demonstrably a case of statutory construction, I could acquiesce to the Court's reading of § 924 (c) in

*I do not agree with the Court of Appeals that Busic could be given enhanced punishments both for aiding and abetting LaRocca's armed assault on a federal officer, in violation of 18 U. S. C. §§ 2, 111, and for unlawfully carrying his own gun while doing so, in violation of 18 U. S. C. § 924 (c)(2). Since Busic was convicted of armed assault "as a principal" under the aiding and abetting statute, 18 U. S. C. § 2, he must be viewed as having used LaRocca's gun as well as carried his own in the course of committing the offense; and, like the Court, *ante*, at 410–411, I am unpersuaded that § 924 (c) authorizes cumulative punishments for the use of one gun and the unlawful carrying of another in a single criminal transaction. It is my view, therefore, that Busic could have been given an enhanced sentence under either § 924 (c)(2) or §§ 2, 111, but not under both.

the interest of *stare decisis*. *Simpson*, however, was based to an unstated degree on this Court's assumption that § 924 (c) raised "the prospect of double jeopardy" because it provided for additional punishment on "precisely the same factual showing" as would be necessary for conviction of the underlying felony involved in that case. See 435 U. S., at 11. In *Simpson* the Court treated the question of the constitutionality of § 924 (c) as if it were separate from the question whether Congress intended to allow cumulative punishment, insisting at one point that "[b]efore an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary . . . to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged." 435 U. S., at 11–12. In dissent, I noted the constitutional undercurrents of the Court's opinion and suggested its concerns were "gauzy" and "metaphysic[al]." *Id.*, at 18.

Recently, this Court unanimously rejected *Simpson*'s constitutional premise. In *Whalen* v. *United States*, 445 U. S. 684 (1980), six Members of this Court held that Congress' intent to impose cumulative punishments at a single criminal proceeding completely controlled the question of double jeopardy. See *id.*, at 688–689; *id.*, at 697–698 (BLACKMUN, J., concurring in judgment). See also *ante*, at 413, (BLACKMUN, J., concurring). Three other Members of this Court, including myself, argued that the permissibility of cumulative punishments in the same criminal proceeding presented no double jeopardy question whatsoever. See *Whalen* v. *United States*, *supra*, at 696 (WHITE, J., concurring in part and concurring in judgment); at 701–707 (REHNQUIST, J., joined by BURGER, C. J., dissenting). I believe that this Court, having thus disposed of *Simpson*'s constitutional underpinnings, should reconsider its holding that § 924 (c) does not, in fact, apply to "any felony."

I know of no cases besides *Simpson* and the present decision where this Court has taken a criminal statute absolutely clear on its face, has looked to the legislative history to create an "ambiguity," and then has resolved that ambiguity in a manner totally at odds with the statute's plain wording. Because I believe *Simpson* was wrongly decided, and because this Court has now repudiated *Simpson*'s constitutional premise, I would overrule *Simpson*, vacate the judgments below, and remand for reconsideration by the Court of Appeals.

GODFREY *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 78-6899. Argued February 20, 1980—Decided May 19, 1980

Under a provision of the Georgia Code, a person convicted of murder may be sentenced to death if it is found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (This statutory aggravating circumstance was held not to be unconstitutional on its face in *Gregg* v. *Georgia*, 428 U. S. 153.) Upon a jury trial in a Georgia state court, petitioner was convicted of two counts of murder and one count of aggravated assault. The evidence showed that, after his wife, who was living with her mother, had rebuffed his efforts for a reconciliation, petitioner went to his mother-in-law's trailer; fired a shotgun through the window, killing his wife instantly; proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun; and then shot and instantly killed his mother-in-law. Petitioner then called the sheriff's office and, when officers arrived, acknowledged his responsibility, directed an officer to the murder weapon, and later told an officer, "I've done a hideous crime." At the sentencing phase of the trial, the judge quoted to the jury the statutory provision in question, and the jury imposed death sentences on both murder convictions, specifying that the aggravating circumstance as to each conviction was that the offense "was outrageously or wantonly vile, horrible and inhuman." The Georgia Supreme Court affirmed the trial court's judgments in all respects, rejecting petitioner's contention that the statutory provision was unconstitutionally vague and holding that the evidence supported the jury's finding of the statutory aggravating circumstance.

Held: The judgment is reversed insofar as it leaves standing the death sentences, and the case is remanded. Pp. 427–433; 433–442.

243 Ga. 302, 253 S. E. 2d 710, reversed and remanded.

MR. JUSTICE STEWART, joined by MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded that in affirming the death sentences in this case the Georgia Supreme Court adopted such a broad and vague construction of the statute in question as to violate the Eighth and Fourteenth Amendments. Pp. 427–433.

(a) If a State wishes to authorize capital punishment, it has a constitutional responsibility to tailor and apply its law in a manner that

avoids the arbitrary and capricious infliction of the death penalty, and thus it must define the crimes for which death may be imposed in a way that obviates standardless sentencing discretion. Cf. *Furman* v. *Georgia*, 408 U. S. 238; *Gregg* v. *Georgia*, *supra*. Pp. 427–428.

(b) In earlier decisions interpreting the statutory provision, the Georgia Supreme Court concluded that (i) the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" must demonstrate "torture, depravity of mind, or an aggravated battery to the victim," (ii) the phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim, and (iii) the word "torture" must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. Pp. 429–432.

(c) However, the Georgia courts did not so limit the statute in the present case. Petitioner did not torture or commit an aggravated battery upon his victims, or cause either of them to suffer any physical injury preceding their deaths. Nor can the death sentences be upheld on the ground that the murders were "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind." Petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. Pp. 432–433.

MR. JUSTICE MARSHALL, joined by MR. JUSTICE BRENNAN, concurring in the judgment, expressed his continuing belief that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, and also agreed with the plurality that the Georgia Supreme Court's construction of the statutory provision at issue here was unconstitutionally vague under *Gregg* v. *Georgia*, *supra*. He further concluded that, even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language, it being necessary that the jury be instructed on the proper, narrow construction of the statute, and that developments since *Gregg* and its progeny strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated in *Gregg*. Pp. 433–442.

STEWART, J., announced the judgment of the Court and delivered an opinion, in which BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which

BRENNAN, J., joined, *post*, p. 433. BURGER, C. J., filed a dissenting opinion, *post*, p. 442. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 444.

J. Calloway Holmes, Jr., argued the cause for petitioner. With him on the brief was *Gerry E. Holmes*.

John W. Dunsmore, Jr., Assistant Attorney General of Georgia, argued the cause for respondent. With him on the brief were *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Executive Assistant Attorney General, *Don A. Langham*, First Assistant Attorney General, and *John C. Walden*, Senior Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS joined.

Under Georgia law, a person convicted of murder [1] may be sentenced to death if it is found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27–2534.1 (b)(7) (1978). In *Gregg* v. *Georgia*, 428 U. S. 153, the Court held that this statutory aggravating circumstance (§ (b)(7)) is not unconstitutional on its face. Responding to the argument that the language of the provision is "so broad that capi-

[1] Georgia Code § 26–1101 (1978) defines "murder" as follows:

"(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice."

tal punishment could be imposed in any murder case," the joint opinion said:

> "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." 428 U. S., at 201 (opinion of STEWART, POWELL, and STEVENS, JJ.).

Nearly four years have passed since the *Gregg* decision, and during that time many death sentences based in whole or in part on § (b)(7) have been affirmed by the Supreme Court of Georgia. The issue now before us is whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution.[2]

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[2] The other statutory aggravating circumstances upon which a death sentence may be based after conviction of murder in Georgia are considerably more specific or objectively measurable than § (b)(7):

"(1) The offense of murder . . . was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder . . . was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district

I

On a day in early September in 1977, the petitioner and his wife of 28 years had a heated argument in their home. During the course of this altercation, the petitioner, who had consumed several cans of beer, threatened his wife with a knife and damaged some of her clothing. At this point, the petitioner's wife declared that she was going to leave him, and departed to stay with relatives.[3] That afternoon she went to a Justice of the Peace and secured a warrant charging the petitioner with aggravated assault. A few days later, while still living away from home, she filed suit for divorce. Summons was served on the petitioner, and a court hearing was set on a date some two weeks later. Before the date of the hearing, the petitioner on several occasions asked his wife to return to their home. Each time his efforts were rebuffed.

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attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

. . . . .

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." Ga. Code § 27-2534.1 (b) (1978).

In *Arnold* v. *State*, 236 Ga. 534, 540, 224 S. E. 2d 386, 391 (1976), the Supreme Court of Georgia held unconstitutional the portion of the first statutory aggravating circumstances encompassing persons who have a "substantial history of serious assaultive criminal convictions" because it did not set "sufficiently 'clear and objective standards.'"

[3] According to the petitioner, this was not the first time that he and his wife had been separated as a result of his violent behavior. On two or more previous occasions the petitioner had been hospitalized because of his drinking problem.

At some point during this period, his wife moved in with her mother. The petitioner believed that his mother-in-law was actively instigating his wife's determination not to consider a possible reconciliation.

In the early evening of September 20, according to the petitioner, his wife telephoned him at home. Once again they argued. She asserted that reconciliation was impossible and allegedly demanded all the proceeds from the planned sale of their house. The conversation was terminated after she said that she would call back later. This she did in an hour or so. The ensuing conversation was, according to the petitioner's account, even more heated than the first. His wife reiterated her stand that reconciliation was out of the question, said that she still wanted all the proceeds from the sale of their house, and mentioned that her mother was supporting her position. Stating that she saw no further use in talking or arguing, she hung up.

At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

The petitioner then called the local sheriff's office, identified himself, said where he was, explained that he had just killed his wife and mother-in-law, and asked that the sheriff come and pick him up. Upon arriving at the trailer, the law enforcement officers found the petitioner seated on a chair in open view near the driveway. He told one of the officers that "they're dead, I killed them" and directed the officer to the place where he had put the murder weapon. Later the

petitioner told a police officer: "I've done a hideous crime, . . . but I have been thinking about it for eight years . . . I'd do it again."

The petitioner was subsequently indicted on two counts of murder and one count of aggravated assault. He pleaded not guilty and relied primarily on a defense of temporary insanity at his trial. The jury returned verdicts of guilty on all three counts.

The sentencing phase of the trial was held before the same jury. No further evidence was tendered, but counsel for each side made arguments to the jury. Three times during the course of his argument, the prosecutor stated that the case involved no allegation of "torture" or of an "aggravated battery." When counsel had completed their arguments, the trial judge instructed the jury orally and in writing on the standards that must guide them in imposing sentence. Both orally and in writing, the judge quoted to the jury the statutory language of the § (b)(7) aggravating circumstance in its entirety.

The jury imposed sentences of death on both of the murder convictions. As to each, the jury specified that the aggravating circumstance they had found beyond a reasonable doubt was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman."

In accord with Georgia law in capital cases, the trial judge prepared a report in the form of answers to a questionnaire for use on appellate review. One question on the form asked whether or not the victim had been "physically harmed or tortured." The trial judge's response was "No, as to both victims, excluding the actual murdering of the two victims." [4]

The Georgia Supreme Court affirmed the judgments of the trial court in all respects. 243 Ga. 302, 253 S. E. 2d 710

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[4] Another question on the form asked the trial judge to list the mitigating circumstances that were in evidence. The judge noted that the petitioner had no significant history of prior criminal activity.

(1979). With regard to the imposition of the death sentence for each of the two murder convictions, the court rejected the petitioner's contention that § (b)(7) is unconstitutionally vague. The court noted that Georgia's death penalty legislation had been upheld in *Gregg* v. *Georgia*, 428 U. S. 153, and cited its prior decisions upholding § (b)(7) in the face of similar vagueness challenges. 243 Ga., at 308–309, 253 S. E. 2d, at 717. As to the petitioner's argument that the jury's phraseology was, as a matter of law, an inadequate statement of § (b)(7), the court responded by simply observing that the language "was not objectionable." 243 Ga., at 310, 253 S. E. 2d, at 718. The court found no evidence that the sentence had been "imposed under the influence of passion, prejudice, or any other arbitrary factor," held that the sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, and stated that the evidence suported the jury's finding of the § (b)(7) statutory aggravating circumstance. 243 Ga., at 309–311, 253 S. E. 2d, at 717–718. Two justices dissented.

II

In *Furman* v. *Georgia*, 408 U. S. 238, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg* v. *Georgia, supra*, reaffirmed this holding:

> "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." 428 U. S., at 189 (opinion of STEWART, POWELL, and STEVENS, JJ.).

A capital sentencing scheme must, in short, provide a " 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' "

Id., at 188, quoting *Furman* v. *Georgia*, *supra*, at 313 (WHITE, J., concurring).

This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." *Gregg* v. *Georgia*, *supra*, at 196, n. 47. See also *Proffitt* v. *Florida*, 428 U. S. 242; *Jurek* v. *Texas*, 428 U. S. 262. It must channel the sentencer's discretion by "clear and objective standards" [5] that provide "specific and detailed guidance," [6] and that "make rationally reviewable the process for imposing a sentence of death." [7] As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur." 428 U. S., at 195, n. 46.

In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." [8] There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost

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[5] *Gregg* v. *Georgia*, 428 U. S., at 198, quoting *Coley* v. *State*, 231 Ga. 829, 834, 204 S. E. 2d 612, 615 (1974).

[6] *Proffitt* v. *Florida*, 428 U. S., at 253 (opinion of STEWART, POWELL, and STEVENS, JJ.).

[7] *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (opinion of STEWART, POWELL, and STEVENS, JJ.).

[8] See also *Ruffin* v. *State*, 243 Ga. 95, 106–107, 252 S. E. 2d 472, 480 (1979); *Hill* v. *State*, 237 Ga. 794, 802, 229 S. E. 2d 737, 742–743 (1976). Cf. *Holton* v. *State*, 243 Ga. 312, 318, 253 S. E. 2d 736, 740 (1979).

every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance. Ga. Code § 27–2537 (c)(2) (1978).

In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep § (b)(7) within constitutional bounds. Recognizing that "there is a possibility of abuse of [the § (b)(7)] statutory aggravating circumstance," the court has emphasized that it will not permit the language of that subsection simply to become a "catchall" for cases which do not fit within any other statutory aggravating circumstance. *Harris* v. *State*, 237 Ga. 718, 732, 230 S. E. 2d 1, 10 (1976). Thus, in exercising its function of death sentence review, the court has said that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." *Id.*, at 733, 230 S. E. 2d, at 11.

When *Gregg* was decided by this Court in 1976, the Georgia Supreme Court had affirmed two death sentences based wholly on § (b)(7). See *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974); *House* v. *State*, 232 Ga. 140, 205 S. E. 2d 217 (1974). The homicide in *McCorquodale* was "a horrify-

ing torture-murder." [9] There, the victim had been beaten, burned, raped, and otherwise severely abused before her death by strangulation. The homicide in *House* was of a similar ilk. In that case, the convicted murderer had choked two 7-year-old boys to death after having forced each of them to submit to anal sodomy.

Following our decision in *Gregg*, the Georgia Supreme Court for the first time articulated some of the conclusions it had reached with respect to § (b)(7):

> "This aggravating circumstance involves both the effect on the victim, viz., torture, or an aggravated battery; and the offender, viz., depravity of mind. As to both parties the test is that the acts (the offense) were outrageously or wantonly vile, horrible or inhuman.
>
> . . . . .
>
> "We believe that each of [the cases decided to date that has relied exclusively on § (b)(7) [10]] establishes beyond any reasonable doubt a depravity of mind and either involved torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman. Each of the cases is at the core and not the periphery. . . ." *Harris* v. *State*, *supra*, at 732–733, 230 S. E. 2d, at 10–11.

Subsequently, in *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637 (1977), the court elaborated on its understanding of § (b)(7). There, the contention was that a jury's finding of the aggravating circumstance could never be deemed unanimous without a polling of each member of the panel. The court said:

> "We find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. Con-

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[9] *Gregg* v. *Georgia*, *supra*, at 201.

[10] *Banks* v. *State*, 237 Ga. 325, 227 S. E. 2d 380 (1976); *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974); *House* v. *State*, 232 Ga. 140, 205 S. E. 2d 217 (1974).

> sidering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the defendant, we find no room for nonunanimous verdicts for the reason that there is no prohibition upon measuring cause on the one hand by effect on the other hand. That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim. . . ." 239 Ga., at 299, 236 S. E. 2d, at 643.[11]

The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim."[12] The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.[13] Indeed, the circumstances proved in a num-

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[11] Since *Harris* and *Blake*, the court has summarily rejected all constitutional challenges to its construction of § (b)(7). See, *e. g.*, *Baker* v. *State*, 243 Ga. 710, 711–712, 257 S. E. 2d 192, 193–194 (1979); *Collins* v. *State*, 243 Ga. 291, 294, 253 S. E. 2d 729, 732 (1979); *Johnson* v. *State*, 242 Ga. 649, 651, 250 S. E. 2d 394, 397–398 (1978); *Lamb* v. *State*, 241 Ga. 10, 15, 243 S. E. 2d 59, 63 (1978).

[12] This construction of § (b)(7) finds strong support in the language and structure of the statutory provision.

[13] "Aggravated battery" is a term that is defined in Georgia's criminal statutes. Georgia Code § 26–1305 (1978) states: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his

ber of the § (b)(7) death sentence cases affirmed by the Georgia Supreme Court have met all three of these criteria.[14]

The Georgia courts did not, however, so limit § (b)(7) in the present case. No claim was made, and nothing in the record before us suggests, that the petitioner committed an aggravated battery upon his wife or mother-in-law or, in fact, caused either of them to suffer any physical injury preceding their deaths. Moreover, in the trial court, the prosecutor repeatedly told the jury—and the trial judge wrote in his sentencing report—that the murders did not involve "torture." Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases. In holding that the evidence supported the jury's § (b)(7) finding, the State Supreme Court simply asserted that the verdict was "factually substantiated."

Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind. . . ."[15] We conclude that the answer must be no.

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body useless, or by seriously disfiguring his body or a member thereof." It appears that this definition has on at least one occasion been treated by the state trial courts as controlling the meaning of the same words in § (b)(7). See, *e. g.*, *Holton* v. *State*, 243 Ga., at 317, n. 1, 253 S. E. 2d, at 740, n. 1.

We note, however, that the *Harris* case apparently did not involve "torture" in this sense.

[14] See, *e. g.*, *Thomas* v. *State*, 240 Ga. 393, 242 S. E. 2d 1 (1977); *Stanley* v. *State*, 240 Ga. 341, 241 S. E. 2d 173 (1977); *Dix* v. *State*, 238 Ga. 209, 232 S. E. 2d 47 (1977); *Birt* v. *State*, 236 Ga. 815, 225 S. E. 2d 248 (1976); *McCorquodale* v. *State*, *supra*.

[15] The sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might

The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously.[16] They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner* v. *Florida*, 430 U. S. 349, 358, it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment.

I continue to believe that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. In addition, I agree with the plurality that the Georgia Supreme Court's construction of the provision at issue in this case is unconstitutionally vague under *Gregg* v. *Georgia*, 428 U. S. 153 (1976). I write

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constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such.

[16] In light of this fact, it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational.

separately, first, to examine the Georgia Supreme Court's application of this provision, and second, to suggest why the enterprise on which the Court embarked in *Gregg* v. *Georgia, supra,* increasingly appears to be doomed to failure.

I

Under Georgia law, the death penalty may be imposed only when the jury both finds at least one statutory aggravating circumstance and recommends that the sentence of death should be imposed. Ga. Code § 26–3102 (1978). Under Ga. Code § 27–2534.1 (b)(7) (1978), it is a statutory aggravating circumstance to commit a murder that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." In *Gregg* v. *Georgia, supra,* the Court rejected a facial challenge to the constitutionality of this aggravating circumstance. The joint opinion conceded that it is "arguable that any murder involves depravity of mind or an aggravated battery." 428 U. S., at 201 (opinion of STEWART, POWELL, and STEVENS, JJ.). Nonetheless, that opinion refused to invalidate the provision on its face, reasoning that the statutory "language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction." *Ibid.* In my view, life and death should not be determined by such niceties of language.

The Court's conclusion in *Gregg* was not unconditional; it was expressly based on the assumption that the Georgia Supreme Court would adopt a narrowing construction that would give some discernible content to § (b)(7). In the present case, no such narrowing construction was read to the jury or applied by the Georgia Supreme Court on appeal. As it has so many times in the past, that court upheld the jury's finding with a simple notation that it was supported by the evidence. The premise on which *Gregg* relied has thus proved demonstrably false.

For this reason, I readily agree with the plurality that, as applied in this case, § (b)(7) is unconstitutionally vague.[1] The record unequivocally establishes that the trial judge, the prosecutor, and the jury did not believe that the evidence showed that either victim was tortured. Nor was there aggravated battery to the victims.[2] I also agree that since the victims died instantaneously and within a few moments of each other, the fact that the murder weapon was one which caused extensive damage to the victim's body is constitutionally irrelevant. *Ante*, at 433, n. 16.

I am unwilling, however, to accept the plurality's characterization of the decision below as an aberrational lapse on the part of the Georgia Supreme Court from an ordinarily narrow construction of § (b)(7). Reasoning from two decisions rendered shortly after our decision in *Gregg*, *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637 (1977), and *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), the plurality suggests that from 1977 onward it has been the law of Georgia that a statutory aggravating circumstance can be found under § (b)(7) only if the offense involved torture and aggravated battery, manifested by "evidence of serious physical abuse of

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[1] My Brother WHITE appears to mischaracterize today's holding in suggesting that a "majority of this Court disagrees" with the conclusion that the "facts supported the jury's finding of the existence of statutory aggravating circumstance § (b)(7)." *Post*, at 449. The question is not whether the facts support the jury's finding. As in any case raising issues of vagueness, the question is whether the court below has adopted so ambiguous a construction of the relevant provision that the universe of cases that it comprehends is impermissibly large, thus leaving undue discretion to the decisionmaker and creating intolerable dangers of arbitrariness and caprice.

[2] Georgia Code § 26–1305 (1978) provides, in pertinent part: "A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof."

the victim before death." *Ante*, at 431.[3] But we cannot stop reading the Georgia Reports after those two cases. In *Ruffin* v. *State*, 243 Ga. 95, 252 S. E. 2d 472 (1979), the court upheld a jury finding of a § (b)(7) aggravating circumstance stated in the words, "we the jurors conclude that this act was both horrible and inhuman." The case involved a shotgun murder of a child: no torture or aggravated battery was present. See also *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736, cert. denied, 444 U. S. 925 (1979).[4] The Georgia court's cursory treatment of § (b)(7) in *Ruffin*, *Holton*, and the present case indicates either that it has abandoned its intention of reaching only "core" cases under § (b)(7) or that its understanding of the "core" has become remarkably inclusive.

In addition, I think it necessary to emphasize that even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to

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[3] My Brother WHITE also assumes that § (b)(7) "applie[s] in its entirety," *post*, at 448, so that the aggravating circumstance cannot be found unless the jury finds torture, depravity of mind, or aggravated battery to the victim.

[4] In *Holton* v. *State*, the defendant murdered a husband and wife. Both victims died of gunshot wounds. The husband had sustained wounds to his ear and shoulder which were apparently caused by blows from a tomahawk. The wife had been stabbed in the back and her ear almost severed after she died. The jury was instructed in the language of § (b)(7), but the word "torture" was omitted since there was no evidence of torture before the deaths occurred. The court also instructed the jury on the statutory definition of aggravated battery, but informed them that they could not find an aggravated battery to the wife. The jury found as an aggravating circumstance the fact that the murder was committed "by reason of depravity of mind." The Georgia Supreme Court indicated in dictum that the omission of the words "outrageously or wantonly vile, horrible or inhuman," rendered the finding impermissibly vague, but did not comment on the instructions to the jury. Apparently, then, the court would have permitted the jury to find that the murder of the wife fell within § (b)(7) even though there was neither torture nor aggravated battery. See also n. 11, *infra*.

otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards. See *ante*, at 428. To give the jury an instruction in the form of the bare words of the statute—words that are hopelessly ambiguous and could be understood to apply to any murder, see *ante*, at 428–429; *Gregg* v. *Georgia*, 428 U. S., at 201—would effectively grant it unbridled discretion to impose the death penalty. Such a defect could not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

For this reason, I believe that the vices of vagueness and intolerably broad discretion are present in any case in which an adequate narrowing construction of § (b)(7) was not read to the jury, and the Court's decision today cannot properly be restricted to cases in which the particular facts appear to be insufficiently heinous to fall within a construction of § (b)(7) that would be consistent with *Gregg*.

II

The preceding discussion leads me to what I regard as a more fundamental defect in the Court's approach to death penalty cases. In *Gregg*, the Court rejected the position, expressed by my Brother BRENNAN and myself, that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. Instead it was concluded that in "a matter so grave as the determination of whether a human life should be taken or spared," it would be both necessary and sufficient to insist on sentencing procedures that would minimize or eliminate the

"risk that [the death penalty] would be inflicted in an arbitrary and capricious manner." 428 U. S., at 189, 188 (opinion of STEWART, POWELL, and STEVENS, JJ.). Contrary to the statutes at issue in *Furman* v. *Georgia*, 408 U. S. 238 (1972), under which the death penalty was "infrequently imposed" upon "a capriciously selected random handful," *id.*, at 309–310 (STEWART, J., concurring), and "the threat of execution [was] too attenuated to be of substantial service to criminal justice," *id.*, at 311–313 (WHITE, J., concurring), it was anticipated that the Georgia scheme would produce an evenhanded, objective procedure rationally "'distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" *Gregg* v. *Georgia*, *supra*, at 198, quoting *Furman*, *supra*, at 313 (WHITE, J., concurring).

For reasons I expressed in *Furman* v. *Georgia*, *supra*, at 314–371 (concurring opinion), and *Gregg* v. *Georgia*, *supra*, at 231–241 (dissenting opinion), I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since *Gregg* make that possibility seem increasingly remote. Nearly every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny. On numerous occasions since *Gregg*, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment,[5] frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers

[5] See, *e. g.*, *Green* v. *Georgid*, 442 U. S. 95 (1979); *Presnell* v. *Georgia*, 439 U. S. 14 (1978); *Bell* v. *Ohio*, 438 U. S. 637 (1978); *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Downs* v. *Ohio*, 438 U. S. 909 (1978); *Shelton* v. *Ohio*, 438 U. S. 909 (1978); *Woods* v. *Ohio*, 438 U. S. 910 (1978); *Roberts* v. *Ohio*, 438 U. S. 910 (1978); *Jordan* v. *Arizona*, 438 U. S. 911 (1978); *Coker* v. *Georgia*, 433 U. S. 584 (1977); *Eberheart* v. *Georgia*, 433 U. S. 917 (1977); *Hooks* v. *Georgia*, 433 U. S. 917 (1977); *Gardner* v. *Florida*, 430 U. S. 349 (1977); *Davis* v. *Georgia*, 429 U. S. 122 (1976).

of arbitrariness in violation of *Gregg* and its companion cases. These developments, coupled with other persuasive evidence,[6] strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in *Gregg*. The disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences.[7] And while hundreds have been placed on death row in the years since *Gregg*,[8] only three persons have been executed.[9] Two of them made no effort to challenge their sentence and were thus permitted to commit what I have elsewhere described as "state-administered suicide." *Lenhard*

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[6] See generally Dix, Appellate Review of the Decision To Impose Death, 68 Geo. L. J. 97 (1979). Professor Dix's meticulous study of the process of appellate review in Georgia, Florida, and Texas since 1976 demonstrates that "objective standards" for the imposition of the death penalty have not been achieved and probably are impossible to achieve, and concludes that *Gregg* and its companion cases "mandate pursuit of an impossible goal." 68 Geo. L. J., at 161.

[7] On April 20, 1980, for example, over 40% of the persons on death row were Negroes. See NAACP Legal Defense and Educational Fund, Death Row, U. S. A., 1 (Apr. 20, 1980). See also U. S. Department of Justice, Capital Punishment 1978, pp. 25–30 (1979); *Furman* v. *Georgia*, 408 U. S. 238, 249–257 (1972) (Douglas, J., concurring).

[8] See NAACP Legal Defense and Educational Fund, Death Row, U. S. A. (Apr. 20, 1980) (642 people on death row); U. S. Department of Justice, Capital Punishment 1978, p. 1 (1979) (445 people on death row as of December 31, 1978).

[9] In *Furman*, my Brothers STEWART and WHITE concurred in the judgment largely on the ground that the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment. MR. JUSTICE STEWART stated that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Furman* v. *Georgia*, 408 U. S., at 309–310. MR. JUSTICE WHITE relied on his conclusion that "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.*, at 313. These conclusions have proved to be equally valid under the sentencing schemes upheld in *Gregg*.

v. *Wolff*, 444 U. S. 807, 815 (1979) (dissenting opinion). See also *Gilmore* v. *Utah*, 429 U. S. 1012 (1976). The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system—and perhaps any criminal justice system—is unable to perform.[10] In short, it is now apparent that the defects that led my Brothers DOUGLAS, STEWART, and WHITE to concur in the judgment in *Furman* are present as well in the statutory schemes under which defendants are currently sentenced to death.

The issue presented in this case usefully illustrates the point. The Georgia Supreme Court has given no real content to § (b)(7) in by far the majority of the cases in which it has had an opportunity to do so. In the four years since *Gregg*, the Georgia court has *never* reversed a jury's finding of a § (b)(7) aggravating circumstance.[11] With considerable frequency the Georgia court has, as here, upheld the imposition of the death penalty on the basis of a simple conclusory statement that the evidence supported the jury's finding under § (b)(7).[12] Instances of a narrowing construction are difficult

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[10] See C. Black, Capital Punishment: The Inevitability of Caprice and Mistake (1974); Black, Due Process for Death: *Jurek v. Texas* and Companion Cases, 26 Cath. U. L. Rev. 1 (1976).

[11] In *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736, cert. denied, 444 U. S. 925 (1979), the court reversed a sentence of death on the grounds that the trial judge had given an inadequate charge on mitigating circumstances and that the jury had not been informed that it could recommend a life sentence even though it found a statutory aggravating circumstance. Although in dictum it indicated disapproval of a statutory circumstance based solely on depravity of mind, the court did not reverse the jury's finding under § (b)(7). See also n. 4, *supra*.

[12] See *Willis* v. *State*, 243 Ga. 185, 253 S. E. 2d 70, cert. denied, 444 U. S. 885 (1979); *Baker* v. *State*, 243 Ga. 710, 257 S. E. 2d 192 (1979); *Legare* v. *State*, 243 Ga. 744, 257 S. E. 2d 247, cert. denied, 444 U. S. 984 (1979); *Green* v. *State*, 242 Ga. 261, 249 S. E. 2d 1 (1978), rev'd on other grounds, 442 U. S. 95 (1979); *Young* v. *State*, 239 Ga. 53, 236 S. E. 2d 1, cert. denied, 434 U. S. 1002 (1977); *Gaddis* v. *State*, 239 Ga. 238, 236 S. E. 2d

to find, and those narrowing constructions that can be found have not been adhered to with any regularity. In no case has the Georgia court required a narrowing construction to be given to the jury—an indispensable method for avoiding the "standardless and unchanneled imposition of death sentences." *Ante*, at 429. Genuinely independent review has been exceedingly rare. In sum, I agree with the analysis of a recent commentator who, after a careful examination of the Georgia cases, concluded that the Georgia court has made no substantial effort to limit the scope of § (b)(7), but has instead defined the provision so broadly that practically every murder can fit within its reach. See Dix, Appellate Review of the Decision To Impose Death, 68 Geo. L. J. 97, 110–123 (1979).

The Georgia court's inability to administer its capital punishment statute in an evenhanded fashion is not necessarily attributable to any bad faith on its part; it is, I believe, symptomatic of a deeper problem that is proving to be genuinely intractable. Just five years before *Gregg*, Mr. Justice Harlan stated for the Court that the tasks of identifying "before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be

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594 (1977), cert. denied, 434 U. S. 1088 (1978); *Davis* v. *State*, 236 Ga. 804, 225 S. E. 2d 241, rev'd on other grounds, 429 U. S. 122 (1976); *Jarrell* v. *State*, 234 Ga. 410, 216 S. E. 2d 258 (1975), cert. denied, 428 U. S. 910 (1976); *Floyd* v. *State*, 233 Ga. 280, 210 S. E. 2d 810 (1974), cert. denied, 431 U. S. 949 (1977); *House* v. *State*, 232 Ga. 140, 205 S. E. 2d 217 (1974), cert. denied, 428 U. S. 910 (1976). The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. See *Campbell* v. *State*, 240 Ga. 352, 240 S. E. 2d 828 (1977), cert. denied, 439 U. S. 882 (1978); *Blake* v. *State*, 239 Ga. 292, 236 S. E. 2d 637, cert. denied, 434 U. S. 960 (1977); *Banks* v. *State*, 237 Ga. 325, 227 S. E. 2d 380 (1976), cert. denied, 430 U. S. 975 (1977). That interpretation would of course enable a jury to find a § (b)(7) aggravating circumstance in most murder cases.

fairly understood and applied by the sentencing authority, appear to be . . . beyond present human ability." *McGautha* v. *California*, 402 U. S. 183, 204 (1971). From this premise, the Court in *McGautha* drew the conclusion that the effort to eliminate arbitrariness in the imposition of the death penalty need not be attempted at all. In *Furman*, the Court concluded that the arbitrary infliction of the death penalty was constitutionally intolerable. And in *Gregg*, the Court rejected the premise of *McGautha* and approved a statutory scheme under which, as the Court then perceived it, the death penalty would be imposed in an evenhanded manner.

There can be no doubt that the conclusion drawn in *McGautha* was properly repudiated in *Furman*, where the Court made clear that the arbitrary imposition of the death penalty is forbidden by the Eighth and Fourteenth Amendments. But I believe that the Court in *McGautha* was substantially correct in concluding that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system. For this reason, I remain hopeful that even if the Court is unwilling to accept the view that the death penalty is so barbaric that it is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it—and the death penalty—must be abandoned altogether.

MR. CHIEF JUSTICE BURGER, dissenting.

After murdering his wife and mother-in-law, petitioner informed the police that he had committed a "hideous" crime. The dictionary defines hideous as "morally offensive," "shocking," or "horrible." Thus, the very curious feature of this case is that petitioner himself characterized his crime in terms equivalent to those employed in the Georgia statute. For

my part, I prefer petitioner's characterization of his conduct to the plurality's effort to excuse and rationalize that conduct as just another killing. *Ante*, at 433. The jurors in this case, who heard all relevant mitigating evidence, see *Lockett* v. *Ohio*, 438 U. S. 586 (1978), obviously shared that preference; they concluded that this "hideous" crime was "outrageously or wantonly vile, horrible and inhuman" within the meaning of § (b)(7).

More troubling than the plurality's characterization of petitioner's crime is the new responsibility that it assumes with today's decision—the task of determining on a case-by-case basis whether a defendant's conduct is egregious enough to warrant a death sentence. In this new role, the plurality appears to require "evidence of serious physical abuse" before a death sentence can be imposed under § (b)(7). *Ante*, at 431. For me, this new requirement is arbitrary and unfounded and trivializes the Constitution. Consider, for example, the Georgia case of *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), where the defendant killed a young woman for the thrill of it. As he later confessed, he "didn't want nothing [she] got except [her] life." *Id.*, at 720, 230 S. E. 2d, at 4. Does the plurality opinion mean to suggest that anything in the Constitution precludes a state from imposing a death sentence on such a merciless, gratuitous killer? The plurality's novel physical torture requirement may provide an "objective" criterion, but it hardly separates those for whom a state may prescribe the death sentence from those for whom it may not.

In short, I am convinced that the course the plurality embarks on today is sadly mistaken—indeed confused. It is this Court's function to insure that the rights of a defendant are scrupulously respected; and in capital cases we must see to it that the jury has rendered its decision with meticulous care. But it is emphatically not our province to second-guess the jury's judgment or to tell the states which of their "hide-

ous," intentional murderers may be given the ultimate penalty. Because the plurality does both, I dissent.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The sole question presented by this petition is whether, in affirming petitioner's death sentence, the Georgia Supreme Court adopted such a broad construction of Ga. Code § 27–2534.1 (b)(7) (1978) as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

I

In early September 1977, Mrs. Godfrey, petitioner's wife, left him, moved in with her mother, and refused his entreaty to move back home. She also filed for divorce and charged petitioner with aggravated assault based on an incident in which he had cut some clothes off her body with a knife. On September 20, 1977, Mrs. Godfrey refused petitioner's request to halt divorce proceedings so that they could attempt a reconciliation. That same day petitioner carried his single-action shotgun to his mother-in-law's trailer home, where his wife, her mother, and the couple's 11-year-old daughter were playing a game around a table. Firing through a window, petitioner killed his wife with a shotgun blast to the head. As his daughter, running for help, attempted to rush past him, he struck her on the head with the barrel of the gun; she nonetheless was able to run on for help. Petitioner then reloaded his shotgun and, after entering the home, fired a fatal blast at his mother-in-law's head. After calling the police himself, petitioner was arrested, advised of his rights, and taken to the police station, where he told an officer that he had committed a "hideous crime" about which he had thought for eight years and that he would do it again.

Petitioner, over his defense of insanity, was convicted of the murders of his wife and his mother-in-law and of the

aggravated assault of his daughter. He was sentenced to death for each of the murders and to 10 years' imprisonment for the aggravated assault. Under the Georgia death penalty scheme, a person can be sentenced to death only if "the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed." Ga. Code § 26–3102 (1978). The statutory aggravating circumstance upon which petitioner's sentence was premised reads: "The offense of murder . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim." § 27–2534.1 (b)(7) ("§ (b)(7)"). In petitioner's case, however, the jury, upon returning its recommendation of death, described the aggravating circumstance as follows: "[T]hat the offense of murder was outrageously or wantonly vile, horrible and inhuman." This attenuated statement of § (b)(7) in part forms the basis of petitioner's challenge to the Georgia Supreme Court's decision, for that court held that "[t]he evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology was not objectionable." 243 Ga. 302, 310, 253 S. E. 2d 710, 718.

II

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we upheld the constitutionality of the capital-sentencing procedures in accordance with which the State of Georgia has sentenced petitioner to death. Two aspects of that scheme impressed us in particular as curing the constitutional defects in the system that was invalidated several years earlier in *Furman* v. *Georgia*, 408 U. S. 238 (1972). First, the sentencing system specifies statutory aggravating circumstances, one of which has to be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed. Ga. Code §§ 26–3102, 27–2534.1 (1978). Second, the scheme provides for automatic appeal of all death sentences to the

Georgia Supreme Court, which is required by statute to undertake a specific inquiry with respect to the soundness of the decision to impose the death penalty. § 27–2537.[1] "In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, . . . the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate." 428 U. S., at 198 (opinion of STEWART, POWELL, and STEVENS, JJ.); see *id.*, at 204–206; *id.*, at 223–224 (opinion of WHITE, J.). Petitioner maintains that, at least in his case, the Georgia Supreme Court has failed in its review function because, by construing § (b)(7) to authorize the imposition of the death penalty on him, the court has interpreted that provision in an unconstitutionally broad fashion.

The opinion announcing the judgment of the Court in *Gregg* recognized that § (b)(7), which would authorize imposition of the death penalty here if either of the murders was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," presented some potential interpretative difficulty because "arguabl[y] . . . any murder involves depravity of mind or an aggravated battery." 428 U. S., at 201 (opinion of STEWART, POWELL, and STEVENS, JJ.). "But," the opinion continued, "this language need not be construed in this way, and there is no reason to assume

[1] According to the statute, the Georgia Supreme Court must determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27–2534.1 (b), and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code § 27–2537 (c) (1978).

that the Supreme Court of Georgia will adopt such an open-ended construction." *Ibid.* By concluding that the Supreme Court of Georgia has adopted "such an open-ended construction" in the present case, the Court has now turned a blind eye to the facts surrounding the murders of Mrs. Godfrey and her mother and to the constancy of the State Supreme Court in performance of its statutory review function.

III

This case presents a preliminary difficulty because the sentencing jury found merely that "the offense of murder was outrageously or wantonly vile, horrible and inhuman," and did not repeat in its finding the entire incantation of § (b)(7). The Georgia Supreme Court found the jury's phraseology unobjectionable; and because this judgment was rendered in the same sentence in which the court expressed its determination that sufficient evidence supported the jury's finding of statutory aggravating circumstance § (b)(7), the court presumably believed that the jury's finding met all necessary terms of the provision notwithstanding the jury's abbreviated statement.

Petitioner argues, however, that the Georgia Supreme Court, by not deeming the jury's abbreviated statement as reversible error, has endorsed a view of § (b)(7) that allows for the provision's application upon a finding that a murder was "outrageously or wantonly vile, horrible or inhuman," even though the murder involved no "torture, depravity of mind, or . . . aggravated battery to the victim." Such a finding, petitioner contends, would be incomplete and indicative of an unconstitutionally broad construction of the provision, for the language "outrageously or wantonly vile, horrible or inhuman" cannot "objectively guide and channel jury discretion in the imposition of a death sentence in compliance with the command of the 8th and 14th Amendments. . . ." Brief for Petitioner 23. The plurality opinion seems to agree. *Ante,* at 428.

I find petitioner's argument unpersuasive, for it is apparent that both the jury and the Georgia Supreme Court understood and applied § (b)(7) in its entirety. The trial court instructed the jurors that they were authorized to fix petitioner's punishment for murder as death or imprisonment for life and that they could consider any evidence in mitigation. App. 79. They were also specifically instructed to determine whether there was a statutory aggravating circumstance present beyond a reasonable doubt and that the aggravating circumstance that they could consider was "[t]hat the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Ibid.* That the jury's ultimate recitation of the aggravating circumstance was abbreviated reveals, in my view, no gap of constitutional magnitude in its understanding of its duty. It is perfectly evident, moreover, that, in exercising its review function, the Georgia Supreme Court understood that the provision applied in its entirety, just as in the past it has insisted that the provision be read as a whole and not be applied disjunctively. *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), cert. denied, 431 U. S 933 (1977); *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736 (a finding of "depravity of mind" is insufficient to support a death sentence), cert. denied, 444 U. S. 925 (1979). The court, after quoting the language of the jury's finding, cited § (b)(7) and, more tellingly, referred to the discrepancy between the two versions as a mere problem of "phraseology." As such, the jury's version, in the court's view, "was not objectionable." 243 Ga., at 310, 253 S. E. 2d, at 718.

Thus, while both sides to this litigation felt constrained to engage in elaborate structural arguments regarding § (b)(7)—focusing on grammar and syntax, nuance and implication—I ascribe no constitutional significance at all to the jury's attenuated statement of the provision, and thus regard the question whether certain language in the section is severable from the rest as immaterial to the decision of this case.

IV

The question remains whether the facts of this case bear sufficient relation to § (b)(7) to conclude that the Georgia Supreme Court responsibly and constitutionally discharged its review function. I believe that they do.

As described earlier, petitioner, in a coldblooded executioner's style, murdered his wife and his mother-in-law and, in passing, struck his young daughter on the head with the barrel of his gun. The weapon, a shotgun, is hardly known for the surgical precision with which it perforates its target. The murder scene, in consequence, can only be described in the most unpleasant terms. Petitioner's wife lay prone on the floor. Mrs. Godfrey's head had a hole described as "[a]pproximately the size of a silver dollar" on the side where the shot entered, and much less decipherable and more extensive damage on the side where the shot exited. Tr. 259. Pellets that had passed through Mrs. Godfrey's head were found embedded in the kitchen cabinet.

It will be remembered that after petitioner inflicted this much damage, he took out time not only to strike his daughter on the head, but also to reload his single-shot shotgun and to enter the house. Only then did he get around to shooting his mother-in-law, Mrs. Wilkerson, whose last several moments as a sentient being must have been as terrifying as the human mind can imagine. The police eventually found her face-down on the floor with a substantial portion of her head missing and her brain, no longer cabined by her skull, protruding for some distance onto the floor. Blood not only covered the floor and table, but dripped from the ceiling as well.

The Georgia Supreme Court held that these facts supported the jury's finding of the existence of statutory aggravating circumstance § (b)(7). A majority of this Court disagrees. But this disagreement, founded as it is on the notion that the lower court's construction of the provision was overly broad, in fact reveals a conception of this Court's role in back-

stopping the Georgia Supreme Court that is itself overly broad. Our role is to correct genuine errors of constitutional significance resulting from the application of Georgia's capital sentencing procedures; our role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of facts that quite reasonably—perhaps even quite plainly—fit within the statutory language.[2]

Who is to say that the murders of Mrs. Godfrey and Mrs. Wilkerson were not "vile," or "inhuman," or "horrible"? In performing his murderous chore, petitioner employed a weapon known for its disfiguring effects on targets, human or other, and he succeeded in creating a scene so macabre and revolting that, if anything, "vile," "horrible," and "inhuman" are descriptively inadequate.

And who among us can honestly say that Mrs. Wilkerson did not feel "torture" in her last sentient moments. Her daughter, an instant ago a living being sitting across the table from Mrs. Wilkerson, lay prone on the floor, a bloodied and mutilated corpse. The seconds ticked by; enough time for her son-in-law to reload his gun, to enter the home, and to

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[2] The plurality opinion, *ante*, at 433, and n. 16, states that "[a]n interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational" and that the fact that both "victims were killed instantaneously" makes the gruesomeness of the scene irrelevant. This view ignores the indisputable truth that Mrs. Wilkerson did not die "instantaneously"; she had many moments to contemplate her impending death, assuming that the stark terror she must have felt permitted any contemplation. More importantly, it also ignores the obvious correlation between gruesomeness and "depravity of mind," between gruesomeness and "aggravated battery," between gruesomeness and "horrible," between gruesomeness and "vile," and between gruesomeness and "inhuman." Mere gruesomeness, to be sure, would not itself serve to establish the existence of statutory aggravating circumstance § (b)(7). But it certainly fares sufficiently well as an indicator of this particular aggravating circumstance to signal to a reviewing court the distinct possibility that the terms of the provision, upon further investigation, might well be met in the circumstances of the case.

take a gratuitous swipe at his daughter. What terror must have run through her veins as she first witnessed her daughter's hideous demise and then came to terms with the imminence of her own. Was this not torture? And if this was not torture, can it honestly be said that petitioner did not exhibit a "depravity of mind" in carrying out this cruel drama to its mischievous and murderous conclusion? I should have thought, moreover, that the Georgia court could reasonably have deemed the scene awaiting the investigating policemen as involving "an aggravated battery to the victim[s]." Ga. Code § 27–2534.1 (b)(7) (1978).

The point is not that, in my view, petitioner's crimes were definitively vile, horrible, or inhuman, or that, as I assay the evidence, they beyond *any* doubt involved torture, depravity of mind, or an aggravated battery to the victims. Rather, the lesson is a much more elementary one, an instruction that, I should have thought, this Court would have taken to heart long ago. Our mandate does not extend to interfering with factfinders in state criminal proceedings or with state courts that are responsibly and consistently interpreting state law, unless that interference is predicated on a violation of the Constitution. No convincing showing of such a violation is made here, for, as MR. JUSTICE STEWART has written in another place, the issue here is not what *our* verdict would have been, but whether "any rational factfinder" could have found the existence of aggravating circumstance § (b)(7). *Jackson* v. *Virginia*, 443 U. S. 307, 313 (1979). Faithful adherence to this standard of review compels our affirmance of the judgment below.[3]

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[3] The plurality opinion notes that the prosecutor informed the jury that the case involved no torture or aggravated battery and suggests that this fact somehow undermines the belief that a properly complete understanding of § (b)(7) was applied in this case. *Ante*, at 426, 432. But as I observe in text, the trial court judge instructed the jurors to consider § (b)(7) in its entirety and thus did not impose a similarly circumscribed

V

Under the present statutory regime, adopted in response to *Furman*, the Georgia Supreme Court has responsibly and consistently performed its review function pursuant to the Georgia capital-sentencing procedures. The State reports that, at the time its brief was written, the Georgia Supreme Court had reviewed some 99 cases in which the death penalty has been imposed. Of these, 66 had been affirmed; 5 had been reversed for errors in the guilt phase; and 22 had been

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view of the case on the jurors. At any event, the prosecutor did argue to the jury that there was depravity of mind. App. 76.

The plurality also notes that in the sentencing report filled out by the trial judge, he wrote that the victims here had not been physically harmed or tortured beyond the fact of their murders. But any argument supportive of the plurality's position based on the judge's sentencing report is undermined by the plurality opinion itself. For that opinion makes clear that the Georgia Supreme Court, in the course of exercising its review function, has developed "criteria" to guide its application of § (b)(7), criteria of which this Court's plurality apparently approves. *Ante*, at 431–432. Surely a court capable of developing such criteria is also capable of keeping them in mind when deciding the latest case to involve the statutory provision that gave birth to the criteria in the first place. Yet the plurality does not recognize the seemingly inescapable conclusion that the Georgia Supreme Court, when affirming petitioner's convictions and sentences, matched the facts of this case to its understanding of the statute and, irrespective of the trial judge's comments, concluded that § (b)(7) properly formed the basis for the imposition of the death penalty. The plurality instead seems to adopt the curious notion that a trial judge is capable of binding an appellate court in the performance of its statutory duty to review trial court determinations.

The plurality opinion also is troubled by the fact that the trial judge gave no guidance to the jurors by way, presumably, of defining the terms in § (b)(7). *Ante*, at 429. Yet the opinion does not demonstrate that such definitions were provided in cases in which the plurality would agree that § (b)(7) was properly applied. Nor does the opinion demonstrate that such definitions obtain a constitutional significance apart from an independent showing—absent here—that juries and courts cannot rationally apply an unequivocal legislative mandate.

reversed for errors in the sentencing phase.[4] Brief for Respondent 13–14. This reversal rate of over 27% is not substantially lower than the historic reversal rate of state supreme courts. See Courting Reversal: The Supervisory Role of State Supreme Courts, 87 Yale L. J. 1191, 1198, 1209 (1978), where it is indicated that 16 state supreme courts over a 100-year period, in deciding 5,133 cases, had a reversal rate of 38.5%; for criminal cases, the reversal rate was 35.6%. To the extent that the reversal rate is lower than the historic level, it doubtless can be attributed to the great and admirable extent to which discretion and uncertainty have been removed from Georgia's capital-sentencing procedures since our decision in *Furman* and to the fact that review is mandatory. See 87 Yale L. J., at 1200–1201.

The Georgia Supreme Court has vacated a death sentence where it believed that the statutory sentencing procedures, as passed by the legislature, were defective, *Gregg* v. *State*, 233 Ga. 117, 210 S. E. 2d 659 (1974) (holding, *inter alia*, that the death penalty for armed robbery was impermissible), aff'd on other grounds, 428 U. S. 153 (1976); it has held that jurors must be instructed that they can impose a life sentence even though they find the existence of a statutory aggravating circumstance, *Fleming* v. *State*, 240 Ga. 142, 240 S. E. 2d 37 (1977); it has reversed the imposition of the death penalty

[4] This Court has reversed six of the cases owing to errors of law rising to constitutional significance. *Green* v. *Georgia*, 442 U. S. 95 (1979) (relevant evidence was improperly excluded from the sentencing hearing); *Presnell* v. *Georgia*, 439 U. S. 14 (1978) (Georgia Supreme Court erred by affirming a death sentence for murder based on an underlying rape charge of which the defendant was not properly tried and convicted); *Coker* v. *Georgia*, 433 U. S. 584 (1977) (under the Eighth and Fourteenth Amendments, death is an excessive penalty for a rapist who does not also commit murder); *Eberheart* v. *Georgia*, 433 U. S. 917 (1977) (same as *Coker*); *Hooks* v. *Georgia*, 433 U. S. 917 (1977) (same as *Coker*); *Davis* v. *Georgia*, 429 U. S. 122 (1976) (a prospective juror was excluded from jury service in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968)).

where the prosecutor made an improper comment during his argument to the jury in the sentencing phase, *Prevatte* v. *State*, 233 Ga. 929, 214 S. E. 2d 365 (1975); *Jordan* v. *State*, 233 Ga. 929, 214 S. E. 2d 365 (1975); it has reversed a trial court's decision limiting the type of mitigating evidence that could be presented, *Brown* v. *State*, 235 Ga. 644, 220 S. E. 2d 922 (1975); it has set aside a death sentence when jurors failed to specify which aggravating circumstances they found to exist, *Sprouse* v. *State*, 242 Ga. 831, 252 S. E. 2d 173 (1979); it has reversed a death sentence imposed on a partial finding of an aggravating circumstance, *Holton* v. *State*, 243 Ga. 312, 253 S. E. 2d 736, cert. denied, 444 U. S. 925 (1979); it has disapproved a death penalty because of errors in admitting evidence, *Stack* v. *State*, 234 Ga. 19, 214 S. E. 2d 514 (1975); it has reversed a capital sentence where a codefendant received only a life sentence, *Hall* v. *State*, 241 Ga. 252, 244 S. E. 2d 833 (1978); and it has held a statutory aggravating circumstance to be unconstitutional, *Arnold* v. *State*, 236 Ga. 534, 224 S. E. 2d 386 (1976).

The Georgia Supreme Court has also been responsible and consistent in its construction of § (b)(7). The provision has been the exclusive or nonexclusive basis for imposition of the death penalty in over 30 cases. In one excursus on the provision's language, the court in effect held that the section is to be read as a whole, construing "depravity of mind," "torture," and "aggravated battery" to flesh out the meaning of "vile," "horrible," and "inhuman." *Harris* v. *State*, 237 Ga. 718, 230 S. E. 2d 1 (1976), cert. denied, 431 U. S. 933 (1977). I see no constitutional error resulting from this understanding of the provision. Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provision disjunctively, *Holton* v. *State*, *supra*, an analysis that, if adopted, would arguably be assailable on constitutional grounds. And the court has noted that it would apply the

provision only in "core" cases and would not permit § (b)(7) to become a "catchall." *Harris* v. *State, supra.*[5]

Nor do the facts of this case stand out as an aberration. A jury found § (b)(7) satisfied, for example, when a child was senselessly and ruthlessly executed by a murderer who, like petitioner, accomplished this end with a shotgun. The Georgia Supreme Court affirmed. *Ruffin* v. *State,* 243 Ga. 95, 252 S. E. 2d 472, cert. denied, 444 U. S. 995 (1979). See *Banks* v. *State,* 237 Ga. 325, 227 S. E. 2d 380 (1976), cert. denied, 430 U. S. 975 (1977). The court has also affirmed a jury's finding of statutory aggravating circumstance § (b)(7) where,

[5] The cases in which a jury has found the existence of § (b)(7) as the sole basis for imposition of the death penalty include *Spraggins* v. *State,* 243 Ga. 73, 252 S. E. 2d 620 (1979) (affirming death sentence for a murder involving multiple stab wounds and partial disembowelment), cert. pending, No. 79-5032; *Holton* v. *State,* 243 Ga. 312, 253 S. E. 2d 736 (reversing death sentence because the jury's finding stated only "depravity of mind"), cert. denied, 444 U. S. 925 (1979); *Godfrey* v. *State,* 243 Ga. 302, 253 S. E. 2d 710 (1979) (case below) (affirming death penalty for shotgun shooting resulting in mutilation); *Johnson* v. *State,* 242 Ga. 649, 250 S. E. 2d 394 (1978) (affirming death sentence for rape and shooting of two women); *Morgan* v. *State,* 241 Ga. 485, 246 S. E. 2d 198 (1978) (affirming death sentence for shotgun shooting of blindfolded victim begging for his life), cert. denied, 441 U. S. 967 (1979); *Ward* v. *State,* 239 Ga. 205, 236 S. E. 2d 365 (1977) (reversing death sentence for stabbing murders because a previous trial had ended in a life sentence; thus death penalty here would be disproportionate); *Blake* v. *State,* 239 Ga. 292, 236 S. E. 2d 637 (affirming death sentence for murder of a child effected by her being thrown off a bridge), cert. denied, 434 U. S. 960 (1977); *Dix* v. *State,* 238 Ga. 209, 232 S. E. 2d 47 (1977) (affirming death sentence for murder accomplished by beating, strangling, and stabbing the victim); *Harris* v. *State,* 237 Ga. 718, 230 S. E. 2d 1 (1976) (affirming death sentence for shooting murder of victim who was forced to beg for her life), cert. denied, 431 U. S. 933 (1977); *Banks* v. *State,* 237 Ga. 325, 227 S. E. 2d 380 (1976) (affirming death sentence for shotgun murder of two victims), cert. denied, 430 U. S. 975 (1977); *Hooks* v. *State,* 233 Ga. 149, 210 S. E. 2d 668 (1974) (affirming death sentence solely for rape), sentence vacated, 433 U. S. 917 (1977).

as here, there was substantial disfigurement of the victim, *McCorquodale* v. *State*, 233 Ga. 369, 211 S. E. 2d 577 (1974), cert. denied, 428 U. S. 910 (1976), and where, as arguably with Mrs. Wilkerson, there was torture of the victim, *ibid.*; *Birt* v. *State*, 236 Ga. 815, 225 S. E. 2d 248, cert. denied, 429 U. S. 1029 (1976).

The majority's attempt to drive a wedge between this case and others in which § (b)(7) has been applied is thus unconvincing, as is any suggestion that the Georgia Supreme Court has somehow failed overall in performance of its review function.[6]

VI

In the circumstances of this case, the majority today endorses the argument that I thought we had rejected in *Gregg:* namely, "that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it." 428 U. S., at 226 (opinion of WHITE, J.). The Georgia Supreme Court, faced with a seemingly endless train of macabre scenes, has endeavored in a responsible, rational, and consistent fashion to effectuate its statutory mandate as illuminated by our judgment in *Gregg*. Today, a majority of this Court, its arguments shredded by its own illogic, informs the Georgia Supreme Court that, to some extent, its efforts have been outside the Constitution. I reject this as an unwarranted invasion into the realm of state law, for, as in

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[6] The plurality opinion states that there is no indication that petitioner's mind was any more depraved than that of any other murderer. *Ante*, at 433. The Court thus assumes the role of a finely tuned calibrator of depravity, demarcating for a watching world the various gradations of dementia that lead men and women to kill their neighbors. I should have thought that, in light of our other duties, such a function would better be performed by the state court statutorily charged with the mission. And unless this Court is willing to supplant the Georgia Supreme Court in the statutory scheme, it would be well advised to reconsider its position.

Gregg, "I decline to interfere with the manner in which Georgia has chosen to enforce [its] laws" until a genuine error of constitutional magnitude surfaces. *Ibid.* (opinion of WHITE, J.).

I would affirm the judgment of the Supreme Court of Georgia.

NAVARRO SAVINGS ASSN. *v.* LEE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-465. Argued March 18, 1980—Decided May 19, 1980

Held: Respondents, as individual trustees of a business trust organized under Massachusetts law, may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship without regard to the citizenship of the trust beneficiaries. A federal court must rest jurisdiction only upon the citizenship of real parties to the controversy, and a trustee is a real party to the controversy for purposes of diversity jurisdiction when (as do respondents here) he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others. Cf. *Bullard* v. *Cisco*, 290 U. S. 179. Respondents are active trustees whose control over the assets held in their names is real and substantial. That the trust may depart from conventional forms in other respects has no bearing upon this determination. Nor does the trust's resemblance to a business enterprise alter the distinctive rights and duties of the trustees. Pp. 460-466.

597 F. 2d 421, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 466.

Bernus Wm. Fischman argued the cause for petitioner. With him on the brief was *Lawrence S. Fischman.*

James A. Ellis, Jr., argued the cause and filed a brief for respondents.

MR. JUSTICE POWELL delivered the opinion of the Court.

The question is whether the trustees of a business trust may invoke the diversity jurisdiction of the federal courts on the basis of their own citizenship, rather than that of the trust's beneficial shareholders.

I

The respondents are eight individual trustees of Fidelity Mortgage Investors, a business trust organized under Massachusetts law.[1] They hold title to real estate investments in trust for the benefit of Fidelity's shareholders.[2] The declaration of trust gives the respondents exclusive authority over this property "free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . ." [3] The respondents have power to transact Fidelity's business, execute documents, and "sue and be sued in the name of the Trust or in their names as Trustees of the Trust." [4] They may invest the funds of the trust, lend money, and initiate or compromise lawsuits relating to the trust's affairs.[5]

In 1971, respondents lent $850,000 to a Texas firm in return for a promissory note payable to themselves as trustees. The note was secured in part by a commitment letter in which petitioner Navarro Savings Association agreed to lend the Texas firm $850,000 to cover its obligation to the respondents. In 1973, respondents called upon Navarro to make the "take-out" loan. Navarro refused, and this action followed. The amended complaint, filed in the United States District Court for the Northern District of Texas, sought approximately $175,000 in damages for breach of contract. Federal jurisdiction was premised upon diversity of citizenship. 28 U. S. C.

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[1] Fidelity merged into a Delaware corporation in 1978, but Federal Rule of Civil Procedure 25 (c) permits the original parties to continue the litigation. Jurisdiction turns on the facts existing at the time the suit commenced. *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 556 (1899).

[2] Fidelity Mortgage Investors Fifth Amended and Restated Declaration of Trust (hereinafter Fidelity Declaration of Trust), App. A44–A45.

[3] *Id.*, Art. 3.1, App. A49–A50.

[4] *Id.*, Art. 1.1, App. A45.

[5] *Id.*, Art. 3.2, App. A50–A55.

§ 1332.[6] The complaint asserted—and the parties agree—that Navarro was a Texas citizen and that each respondent was a citizen of another State. The parties have stipulated, however, that some of Fidelity's beneficial shareholders were Texas residents.

The District Court dismissed the action for want of subject-matter jurisdiction. 416 F. Supp. 1186 (1976). Concluding that a business trust is a citizen of every State in which its shareholders reside, the court held that the parties lacked the complete diversity required by *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806). The Court of Appeals for the Fifth Circuit reversed. 597 F. 2d 421 (1979). It held that the respondent trustees were real parties in interest because they had full power to manage and control the trust and to sue on its behalf. Since complete diversity existed among the actual parties to the controversy, the Court of Appeals directed the District Court to proceed to trial on the merits. We granted certiorari, 444 U. S. 962 (1979), and we now affirm.

II

Federal courts have jurisdiction over controversies between "Citizens of different States" by virtue of 28 U. S. C. § 1332 (a)(1) and U. S. Const., Art. III, § 2. Early in its history, this Court established that the "citizens" upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy. *McNutt* v. *Bland*, 2 How. 9, 15 (1844); see *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 328–329 (1854); *Coal Co.* v. *Blatchford*, 11

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[6] Section 1332 (a)(1) provides:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between . . . citizens of different States. . . ."

In view of our disposition of the case, we need not consider respondents' alternative claim to jurisdiction under 28 U. S. C. § 1331 or their attempt to bring a class action under Federal Rule of Civil Procedure 23.2.

Wall. 172, 177 (1871). Thus, a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy. *E. g., McNutt* v. *Bland, supra,* at 14; see 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, pp. 710–711 (1971).

The early cases held that only persons could be real parties to the controversy. Artificial or "invisible" legal creatures were not citizens of any State. *Bank of United States* v. *Deveaux,* 5 Cranch 61, 86–87, 91 (1809).[7] Although corporations suing in diversity long have been "deemed" citizens, see n. 7, *supra,* unincorporated associations remain mere collections of individuals. When the "persons composing such association" sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co.* v. *Jones,* 177 U. S. 449, 456 (1900) (limited partnership association); see *Steelworkers* v. *Bouligny, Inc.,* 382 U. S. 145 (1965) (labor union); *Chapman* v. *Barney,* 129 U. S. 677 (1889) (joint stock company).

Navarro contends that Fidelity's trust form masks an unincorporated association of individuals who make joint real estate investments. Navarro observes that certain features of the trust's operations also characterize the operations of an association: centralized management, continuity of enterprise, and unlimited duration. Arguing that this trust is in sub-

[7] Although overruled in *Louisville, C., & C. R. Co.* v. *Letson,* 2 How. 497 (1844), *Deveaux* was resurrected by *Marshall* v. *Baltimore & Ohio R. Co.,* 16 How. 314 (1854). *Marshall* held that an artificial entity cannot be a citizen, but that the persons who "act under [corporate] faculties . . . and use [the] corporate name" are presumed to reside in the State of incorporation. *Id.,* at 328; see *St. Louis & S. F. R. Co.* v. *James,* 161 U. S. 545, 562 (1896). This view endured until 1958, when Congress amended the diversity statute to provide explicitly that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." Act of July 25, 1958, § 2, 72 Stat. 415 (codified at 28 U. S. C. § 1332 (c)).

stance an association, Navarro reasons that the real parties to the lawsuit are Fidelity's beneficial shareholders.

III

We need not reject the argument that Fidelity shares some attributes of an association. In certain respects, a business trust also resembles a corporation. But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to this controversy for purposes of a federal court's diversity jurisdiction.[8]

As early as 1808, this Court stated that trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship. *Chappedelaine* v. *Dechenaux*, 4 Cranch 306, 308. Federal Rule of Civil Procedure 17 (a) now provides that such trustees are real parties in interest for procedural purposes.[9] Yet

[8] The dissenting opinion, *post*, at 471–472, and n. 4, 476, n. 7, asserts that Massachusetts law would treat Fidelity as a trust for some purposes and as a partnership for others. Neither the parties nor the courts below addressed these questions of state law. Assuming that the dissent is correct, its observations cast no doubt on our conclusion that Fidelity is a form of express trust. It is black letter law that "[m]any of the rules applicable to trusts are applied to business trusts. . . ." Restatement (Second) of Trusts § 1, Comment *b*, p. 4 (1959). Many others are not. Our task is simply to determine, as a matter of federal law, whether the rules applicable to trustees who sue in diversity fall in the former or the latter category.

[9] There is a "rough symmetry" between the "real party in interest" standard of Rule 17 (a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases. Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 247–250 (1978); see 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, pp. 710–711 (1971). In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17 (a). To establish diversity, however, the union

similar principles governed diversity jurisdiction long before the advent of uniform rules of procedure.[10] In 1870, the Court declared that jurisdiction properly founded upon the diverse citizenship of individual trustees "is not defeated by the fact that the parties whom they represent may be disqualified." *Coal Co.* v. *Blatchford*, 11 Wall., at 175 (mortgage contract). "[T]he residence of those who may have the equitable interest" is simply irrelevant. *Bonnafee* v. *Williams*, 3 How. 574, 577 (1845) (note held in trust for third party). The same rule applies when "the beneficiaries are many." *Dodge* v. *Tulleys*, 144 U. S. 451, 456 (1892) (dictum) (railroad trust deed).[11]

In *Bullard* v. *Cisco*, 290 U. S. 179, 189 (1933), the trust beneficiaries were "numerous and widely scattered" investors who had conveyed certain bonds to a committee formed by a protective agreement. The agreement did not use trust terminology. Nevertheless, the Court held that the "rights, powers and duties expressly assigned" to committee members

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must rely upon the citizenship of each of its members. *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145 (1965).

[10] The Court never has analogized express trusts to business entities for purposes of diversity jurisdiction. Even when the Court espoused the view that a corporation lacked citizenship, *Bank of United States* v. *Deveaux*, 5 Cranch, at 91, Mr. Chief Justice Marshall explained that the doctrine had no bearing on the status of trustees.

"When [persons suing by a corporate name] are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen . . . , who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right."

[11] *Thomas* v. *Board of Trustees*, 195 U. S. 207 (1904), cited by Navarro, is not to the contrary. The Court there considered the Board of Trustees of a state university. Rejecting the contention that the Board was analogous to a corporation, the Court held that jurisdiction depended upon the citizenship of the individual trustees. *Id.*, at 215–217. The Court did not discuss the nature of the "trust" or the possible existence of beneficiaries.

"necessarily" made them trustees. *Ibid.* The agreement gave the committeemen "full title to the deposited bonds," and it defined "the control and power of disposal which the trustees were to have over them." *Ibid.* Refusing to analogize the committee to a collection agency, the Court concluded that "[t]he beneficiaries were not necessary parties and their citizenship was immaterial." *Id.*, at 190.[12]

Bullard reaffirms that a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others.[13] The trustees in this case have such powers. At all relevant times, Fidelity operated under a declaration of trust that authorized the trustees to take legal title to trust assets, to invest those assets for the benefit of the shareholders, and to sue and be sued in their capacity as trustees. Respondents filed this lawsuit in that capacity. They seek damages for breach of an obligation running to the holder of a promissory note held in their own names. Fidelity's 9,500 beneficial shareholders had no voice in the initial investment decision. They can neither

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[12] The actual issue in *Bullard* was not citizenship but amount in controversy. The claims of certain individual bondholders were too small to satisfy the $3,000 jurisdictional threshold then in effect. The trustees, on the other hand, held legal title to unpaid bonds and coupons worth about $350,000. 290 U. S., at 180–181.

[13] The relative simplicity of this established principle, see *post*, at 475, is one of its virtues. "It is of first importance to have a definition . . . [that] will not invite extensive threshold litigation over jurisdiction," although the resulting "differentiations of treatment . . . appear somewhat arbitrary." American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts 128 (1969). "Jurisdiction should be as self-regulated as breathing; . . . litigation over whether the case is in the right court is essentially a waste of time and resources." Currie, The Federal Courts and the American Law Institute, Part I, 36 U. Chi. L. Rev. 1 (1968). The analysis proposed by the dissent, *post*, at 475–476, see *post*, at 467–472, and n. 4, could present serious difficulties for district courts called upon to determine questions of diversity jurisdiction.

control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations.[14]

We conclude that these respondents are active trustees whose control over the assets held in their names is real and substantial. That the trust may depart from conventional forms in other respects has no bearing upon this determination. Nor does Fidelity's resemblance to a business enterprise alter the distinctive rights and duties of the trustees.[15] There is no allegation of sham or collusion. See 28 U. S. C. § 1359; *Bullard* v. *Cisco, supra,* at 187–188, and n. 5. The respondents are not "naked trustees" who act as "mere conduits" for a remedy flowing to others. *McNutt* v. *Bland,* 2 How., at 13–14; see *Browne* v. *Strode,* 5 Cranch 303 (1809). They have legal title; they manage the assets; they control the litigation. In short, they are real parties to the controversy. For more than 150 years, the law has permitted trustees who meet this standard to sue in their own right,

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[14] The shareholders may elect and remove trustees; they may terminate the trust or amend the Declaration; and they must approve any disposition of more than half of the trust estate. Fidelity Declaration of Trust, Arts. 2.2, 6.7, 8.2, 8.3, App. A47, A67, A79–A80. No other shareholder action can bind the trustees. *Id.*, Arts. 3.1, 6.2, App. A49, A64.

The dissent believes that these limited powers of intervention establish a "pervasive measure of [shareholder] control . . . over the trustees' actions. . . ." *Post,* at 476. Therefore, the dissent would hold that Fidelity is a citizen of each State in which any of its 9,500 shareholders resides. But this form of "control" does not strip the trustees of the powers that make them real parties to the controversy for purposes of diversity jurisdiction. See *supra,* at 459, 463–465. Indeed, their authority over trust property—short of partial liquidation—is expressly made "free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . ." Fidelity Declaration of Trust, Art. 3.1, App. A49–A50.

[15] That business trusts may be treated as associations under the Internal Revenue Code, *Morrissey* v. *Commissioner,* 296 U. S. 344 (1935), is simply irrelevant.

without regard to the citizenship of the trust beneficiaries. We find no reason to forsake that principle today.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN, dissenting.

A reader of the Court's conclusory opinion might wonder why this heavily burdened tribunal chose to review this case. Most assuredly, we did not do so merely to reaffirm, *ante*, at 462, Mr. Chief Justice Marshall's ruling from the bench in *Chappedelaine* v. *Dechenaux*, 4 Cranch 306, 308 (1808), to the effect that aliens serving respectively as residuary legatee and representative of an estate, "although they sue as trustees," were entitled to bring a federal diversity action against a Georgia citizen. Rather, I had thought that we granted certiorari to resolve a significant conflict among the Courts of Appeals concerning the question whether the citizenship of a business trust, for purposes of establishing diversity jurisdiction, is determined by looking to the citizenship of its trustees or that of its beneficial shareholders.[1] I believe that the

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[1] Compare the decision below, 597 F. 2d 421 (CA5 1979), rev'g 416 F. Supp. 1186 (ND Tex. 1976), with *Belle View Apartments* v. *Realty ReFund Trust*, 602 F. 2d 668 (CA4 1979), and *Riverside Memorial Mausoleum, Inc.* v. *UMET Trust*, 581 F. 2d 62 (CA3 1978), aff'g 434 F. Supp. 58 (ED Pa. 1977). See also cases cited in n. 6, *infra*, dealing with an analogous question presented in the context of limited partnerships.

The Court of Appeals' decision in this case also conflicts with a substantial body of recent holdings of Federal District Courts that uniformly have looked to the citizenship of the beneficial shareholders, and not the trustees, in determining the existence of diversity in suits brought by or against common-law business trusts. See *National City Bank* v. *Fidelco Growth Investors*, 446 F. Supp. 124 (ED Pa. 1978); *Independence Mortgage Trust* v. *White*, 446 F. Supp. 120 (Ore. 1978); *Lincoln Associates* v. *Great American Mortgage Investors*, 415 F. Supp. 351 (ND Tex. 1976); *Heck* v. *A. P. Ross Enterprises, Inc.*, 414 F. Supp. 971 (ND Ill. 1976); *Carey* v. *U. S. Industries, Inc.*, 414 F. Supp. 794 (ND Ill. 1976); *Chase*

analysis applied by the Court of Appeals in resolving that question was correct, but in applying that same analysis I would reach a different result. I feel that neither the approach now used by this Court, nor the result it reaches, comports with the Massachusetts law of business trusts, or with the Court's precedents concerning diversity jurisdiction.

I

The Court recognizes that Fidelity Mortgage Investors, a Massachusetts business trust, "shares some attributes of an association," and that it "also resembles a corporation." *Ante*, at 462. The Court concludes, however, based on its reading of portions of Fidelity's Declaration of Trust, that it is an "express trust." Taken either as a proposition of the general common-law of trusts,[2] or as an interpretation of the Massachusetts law of business trusts, that conclusion is not nearly so automatic and evident as the Court's scant reasoning implies.

In *Hecht* v. *Malley*, 265 U. S. 144 (1924), this Court described the Massachusetts business trust in terms that have

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Manhattan Mortgage & Realty Trust v. *Pendley*, 405 F. Supp. 593 (ND Ga. 1975); *Jim Walter Investors* v. *Empire-Madison, Inc.*, 401 F. Supp. 425 (ND Ga. 1975); *Larwin Mortgage Investors* v. *Riverdrive Mall, Inc.*, 392 F. Supp. 97 (SD Tex. 1975); *Fox* v. *Prudent Resources Trust*, 382 F. Supp. 81 (ED Pa. 1974). An early decision that appears to be in accord with the Court's "express trust" rationale in the present case is *Simson* v. *Klipstein*, 262 F. 823 (NJ 1920).

[2] The leading reference works dealing with the subject of trusts do not include business trusts within their scope:

"Although many of the rules applicable to trusts are applied to business trusts, yet many of the rules are not applied, and there are other rules which are applicable only to business trusts. The business trust is a special kind of business association and can best be dealt with in connection with other business associations." Restatement (Second) of Trusts § 1, Comment *b*, p. 4 (1959).

See also 1 A. Scott, The Law of Trusts § 2.2 (3d ed. 1967).

come to be accepted as the classic definition, see 16A R. Eickhoff, Fletcher Cyclopedia of the Law of Private Corporations § 8228 (1979):

> "The 'Massachusetts Trust' is a form of business organization, common in that State, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.
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> "Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created. *Williams* v. *Milton*, 215 Mass. 1, 6; *Frost* v. *Thompson*, 219 Mass. 360, 365; *Dana* v. *Treasurer*, 227 Mass. 562, 565; *Priestley* v. *Treasurer*, 230 Mass. 452, 455.
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> "These trusts—whether pure trusts or partnerships—are unincorporated. They are not organized under any statute; and they derive no power, benefit or privilege from any statute. The Massachusetts statutes, however, recognize their existence and impose upon them, as

'associations,' certain obligations and liabilities." (Footnotes omitted.) [3] 265 U. S., at 146–147.

Based on its reading of Fidelity's Fifth Amended and Restated Declaration of Trust, App. A40, and seemingly unconcerned with considerations of state law, the Court determines that respondents "are active trustees whose control over the assets held in their names is real and substantial." *Ante*, at 465. That the trustees' control over the assets of Fidelity is substantial may be accepted without quarrel. The Court fails to recognize, however, that the Declaration of Trust lodges in the beneficial shareholders substantial control over the actions of these trustees. Article 2.1 of the Declaration provides that the trustees are to be elected at annual shareholder meetings by a majority of the shares voted. App. A47. Article 2.2 provides that trustees may be removed from office, with or without cause, by vote of the majority of the outstanding shares. *Ibid.* Article 6.7 vests in the shareholders two significant powers: the ability to call a special meeting upon the request of not less than 20% of the outstanding shares, and the requirement that any sale, lease, exchange, or other disposition of more than 50% of the trust assets is to be made only upon the affirmative approval of the holders of a majority of the shares. *Id.*, at A67. Most significantly, Art. 8.2 reserves to the holders of a majority of the shares the right to terminate the trust at any shareholder meeting, and Art. 8.3 gives them the power to amend the Declaration of Trust itself. *Id.*, at A79–A80.

The leading Massachusetts decision concerning the legal nature of a business trust is *Williams* v. *Inhabitants of Milton*, 215 Mass. 1, 102 N. E. 355 (1913). There the court inquired whether personal property held by the trustees of the Boston

[3] The current statutory requirements governing voluntary associations under a written instrument or declaration of trust are contained in Mass. Gen. Laws Ann., ch. 182, §§ 1–14 (West 1958 and Supp. 1980).

Personal Property Trust was to be taxed as partnership property or investment trust property. In concluding that the indenture of trust created a true trust, the court observed that the shareholders of the trust were not associated in any way, did not hold meetings, and could not force the trustees to amend or terminate the trust. *Id.*, at 10, 102 N. E., at 358. The court emphasized, however, that the parties' intent to create a trust, rather than a partnership, as evidenced in the declaration of trust, was not controlling. "It is what the parties did in making the trust indenture that is decisive." *Id.*, at 12, 102 N. E., at 359.

In *Frost* v. *Thompson*, 219 Mass. 360, 365, 106 N. E. 1009, 1010 (1914), the court distilled from *Williams* the following test:

> "A declaration of trust or other instrument providing for the holding of property by trustees for the benefit of the owners of assignable certificates representing the beneficial interest in the property may create a trust or it may create a partnership. Whether it is the one or the other depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created; but if they are subject to the control of the certificate holders, it is a partnership."

Guided by these principles, the *Frost* court concluded that the "Buena Vista Fruit Company" was a partnership rather than a trust. This conclusion followed from the fact that shareholders representing two-thirds of the outstanding shares had the power to remove any or all of the trustees at any time without cause, to appoint others to fill resulting vacancies, and to terminate the trust. Moreover, shareholders representing a majority of the shares had the power to amend the declaration of trust and bylaws. "These provisions demonstrate that this association is a partnership and not a trust." *Id.*, at 366, 106 N. E., at 1010. Thus, the court concluded

that the trustees could not be sued in an action on a note issued by the Buena Vista Fruit Company.

In a variety of contexts, the Supreme Judicial Court of Massachusetts has continued to observe the line, drawn in *Williams* and in *Frost*, that is based on the relative powers of shareholders and trustees in a business trust.[4] It appears to

[4] In *Priestley* v. *Treasurer & Receiver General*, 230 Mass. 452, 120 N. E. 100 (1918), a trust agreement was held to create a partnership relation among the shareholders because they were associated, had a fixed annual meeting, could call special meetings upon the request of the holders of 10% of the shares, were empowered to fill vacancies in the number of trustees, and could remove the trustees and elect others in their place. The shareholders also were given direct powers to control the trustees' management of the trust property. In *Howe* v. *Chmielinski*, 237 Mass. 532, 130 N. E. 56 (1921), a partnership was found to exist among the shareholders, and the trustees were deemed to be their managing agents, despite the fact that legal title to the property stood in the trustees' names. This result followed from the shareholders' reserved powers under the trust agreement to fill vacancies among the trustees, remove them, direct the sale of trust property, and alter or terminate the trust. And where the shareholders of an unincorporated loan company were given the power to elect the company's officers and directors, to remove them for cause, to fill vacancies, to hold annual and special meetings, and to amend or repeal the bylaws, the court concluded that the company's bylaws "left in the shareholders the ultimate power of control of its affairs with the result that the relationship of partnership and not that of a trust was created." *First National Bank of New Bedford* v. *Chartier*, 305 Mass. 316, 321, 25 N. E. 2d 733, 736 (1940). See also *Ryder's Case*, 341 Mass. 661, 664, 171 N. E. 2d 475, 476–477 (1961).

In *Bouchard* v. *First People's Trust*, 253 Mass. 351, 360, 148 N. E. 895, 899 (1925), the court found that an express trust had been created where the arrangement established by a declaration of trust "involve[d] a total want of legal power by the shareholders as to the trust." In that case the shareholders had no power to direct the management of the trust directly or indirectly, and they had no power to select the trustees or to control their conduct. The Federal District Court applied Massachusetts law in *Gutelius* v. *Stanbon*, 39 F. 2d 621 (Mass. 1930), and followed *Bouchard* in holding that a declaration of trust established a pure trust rather than a partnership. Although the trust agreement provided for shareholder meetings at which the trustees were elected, and permitted

me that the powers lodged in the beneficial shareholders of Fidelity—the powers to elect and remove trustees, to vote on major trust investments, to amend the terms of the trust, and to terminate it—clearly dictate that it falls on the partnership side of the line. And those same powers convert the relationship between Fidelity's trustees and shareholders from one of trusteeship to one of agency. Thus, in *Williams*, the court stated: "The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property." 215 Mass., at 6, 102 N. E., at 356. See also *Howe* v. *Chmielinski*, 237 Mass. 532, 534, 130 N. E. 56, 56 (1921).

I do not suggest that this state-law analysis is fully dispositive of the federal jurisdictional question presented here, see n. 7, *infra*, but it certainly is relevant.[5] Moreover, I be-

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them to terminate the trust at any time, the court deemed it significant that they were not given the right to remove trustees or to amend the declaration of trust. *Id.*, at 625. One must note, however, that every one of the four powers mentioned in *Gutelius*, with two of them lacking in that case, are possessed by the shareholders of Fidelity Mortgage Investors.

The fact that a declaration of trust effectively creates a partnership relation rather than a pure trust has not led the Massachusetts courts to treat the entity as a partnership for all purposes. See *State Street Trust Co.* v. *Hall*, 311 Mass. 299, 41 N. E. 2d 30 (1942), in which it was held that the partnership nature of a real estate trust did not give minority shareholders the right to dissolve the trust at will.

[5] Typically, for example, lower courts faced with the question whether a particular entity is a "corporation" within the meaning of the federal diversity statute, 28 U. S. C. § 1332 (c), have turned to the pertinent provisions of the law of the State under which the entity was organized. See, *e. g.*, *Baer* v. *United Services Automobile Assn.*, 503 F. 2d 393, 394–395 (CA2 1974). In contrast, the Court today evidently has found in our past cases a federal common law of trusts that enables it to ignore state law when the issue presented concerns the threshold question of jurisdiction. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–80 (1938).

State law is not of dispositive assistance in resolving the precise question presented in this case because Massachusetts statutory law recognizes an

lieve that it casts very substantial doubt on the Court's major premise, namely, that Fidelity is an "express trust."

II

Petitioner argues that this case is controlled by the confluence of principles emanating from two of this Court's past decisions, each of which the Court, in its present opinion, essentially relegates to a footnote. The first case, *Morrissey* v. *Commissioner*, 296 U. S. 344 (1935), like *Hecht* v. *Malley*, 265 U. S. 144 (1924), dealt with the tax treatment of a business trust. In holding that such an entity was not an "ordinary trust," the Court observed:

> "In what are called 'business trusts' the object is not to hold and conserve particular property, with incidental powers, as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties; or for dealings in securities or other personal property; or for the production, or manufacture, and sale of commodities; or for commerce, or other sorts of business; where those who become beneficially interested, either by joining in the plan at the outset, or by later participation according to the terms of

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unincorporated business trust as an entity that may itself be sued in an action at law for the debts and obligations incurred by its trustees. Mass. Gen. Laws Ann., ch. 182, § 6 (West 1958); *State Street Trust Co.* v. *Hall*, 311 Mass., at 304, 41 N. E. 2d, at 34. The fact that a business trust has the capacity to sue under the laws of Massachusetts, does not, of course, give it the power to bring a suit on its own behalf in federal court. *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 455 (1900); see also 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3630, pp. 840–841, and nn. 10 and 11 (1975).

> the arrangement, seek to share the advantages of a union of their interests in the common enterprise." 296 U. S., at 357.

These distinctions, along with the similarities between a business trust and a corporation, led the Court to conclude that a business trust was an "association," taxable, along with corporations, joint stock companies, and insurance companies, under § 2 (a)(2) of the respective Revenue Acts of 1924 and 1926, ch. 234, 43 Stat. 253, and ch. 27, 44 Stat. 9.

Concluding that *Morrissey* establishes that Fidelity is an unincorporated association, petitioner argues that it follows that this controversy is then controlled by the second case, *Steelworkers* v. *Bouligny, Inc.*, 382 U. S. 145 (1965). In *Bouligny*, a unanimous Court held that an unincorporated labor union's citizenship for diversity purposes could not be determined without regard to the citizenship of its members. Although the holding of *Bouligny* was limited to the diversity treatment of labor unions, the principles it enunciates are unmistakably broad. The Court rejected the invitation of other courts and commentators to eradicate the distinction between the "citizenship" of corporations, on the one hand, and that of labor unions and other unincorporated associations, on the other hand. See *id.*, at 149–150. The Court stated that it was "of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." *Id.*, at 150–151.

The Court of Appeals in this case recognized the pertinence of *Bouligny* to the problem presented here, but found that case distinguishable. It noted that *Bouligny* is directly applicable only to the situation in which an unincorporated association seeks to establish diversity jurisdiction as an entity. And it adopted the view, earlier suggested in law review com-

mentary,[6] that *Bouligny* did not decide *who* the relevant members are when a court determines the citizenship of an unincorporated association. The Court of Appeals concluded that when an organization has more than one class of members, it is necessary to determine on a case-by-case basis which class comprises the real parties in interest. Focusing its attention on Fidelity's Declaration of Trust, the court held that the trustees were the real parties to this lawsuit because they were designated as having exclusive control of the trust's activities, with the capacity to sue on the trust's behalf and to be sued. See 597 F. 2d 421, 427 (CA5 1979).

I believe that the *approach* of the Court of Appeals in this case was consistent with this Court's prior decisions. And I much prefer it to the simplistic approach the Court now adopts. I am particularly troubled by the Court's intimation that business trusts are to be treated differently from other functionally analogous business associations—partnerships, limited partnerships, joint stock companies, and the like. I fear that, at bottom, the Court's distinction between business trusts and these other enterprises hinges on the locus of title

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[6] The Court of Appeals, 597 F. 2d, at 427, and n. 6, placed substantial reliance upon the student Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384 (1978). That Comment, in turn, credited the dissenting opinion of Judge James Hunter III, in *Carlsberg Resources Corp.* v. *Cambria Savings & Loan Assn.*, 554 F. 2d 1254, 1262–1266 (CA3 1977), for the development of the real-party-in-interest approach in determining which members count in establishing the citizenship of an unincorporated association. 45 U. Chi. L. Rev., at 402–404.

The *Carlsberg Resources* majority held that the citizenship of a limited partnership is determined according to the citizenship of all its partners. The Second Circuit has adopted the contrary view, that is, that the citizenship of the general partners alone is determinative. See *Colonial Realty Corp.* v. *Bache & Co.*, 358 F. 2d 178, cert. denied, 385 U. S. 817 (1966). I read the Court's opinion in this case as expressing no view on the diversity of citizenship issue that is presented when one of the parties is a limited partnership.

to the trust assets, see *ante*, at 459, and 464–466, a formalistic criterion having little to do with a realistic assessment of the respective degrees of control over the trust's activities that may be exercised by shareholders and trustees.

While I prefer and accept the Court of Appeals' approach to this case, I am persuaded, on that approach, that one cannot ignore the pervasive measure of control that Fidelity's shareholders possess over the trustees' actions taken in their behalf. See Part I, *supra*.[7] That factor, in my view, is the principal distinction between the ongoing business entity at issue here and the trust relationship among certificate holders and the bondholders' committee that was at issue in *Bullard* v. *Cisco*, 290 U. S. 179 (1933), cited and relied upon by the Court, *ante*, at 463–464. Though the question is not free from all doubt, in the light of these circumstances I believe that the citizenship of Fidelity should be determined according to the citizenship of its beneficial shareholders, and that diversity jurisdiction does not exist in this case.[8] I therefore dissent from the Court's holding to the contrary.

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[7] The conclusion that the Massachusetts law under which the business trust was created would treat Fidelity as a partnership could lead one to hold that its citizenship is determined with respect to the citizenship of all its shareholder-partners. See *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S., at 456. Nonetheless, because Fidelity is not a partnership for all purposes, see n. 4, *supra*, I hesitate to give such a characterization of its legal nature controlling weight. It seems preferable to me to treat Fidelity as a form of unincorporated business association, and determine its citizenship according to the real-party-in-interest test utilized by the Court of Appeals. One factor that would seem especially pertinent in applying that test is the conclusion that Massachusetts law would treat the relationship between Fidelity's trustees and shareholders as one of agent to principal. See Part I, *supra*.

[8] The author of the Comment cited in n. 6, *supra*, suggests that determining the real parties in interest in an action involving a business trust is complicated by the fact that no uniform statutory framework clearly defines the relative rights and responsibilities of the trustees and the shareholders. The author notes, however, that certain factors may be relevant to a determination that the shareholders, rather than the trustees, are

I would vacate the judgment of the Court of Appeals and remand this case for consideration of respondents' claimed alternative bases for federal jurisdiction that were rejected by the District Court, but not reached by the Court of Appeals.

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the controlling parties. These include: "(1) the right to remove the trustees, (2) the right to terminate the trust, (3) the right to modify the terms of the trust, (4) the right to elect trustees, and (5) the right to direct management decisions of the trustees." 45 U. Chi. L. Rev., at 416. The first four are present in this case; in addition, Fidelity's shareholders have the power to condition major dispositions of the trust assets on their affirmative approval.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL. *v.* TOMANIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–424. Argued February 26, 1980—Decided May 19, 1980

Pursuant to New York statutes requiring that chiropractic practitioners obtain a state license either by passing an examination or obtaining a waiver of the examination requirement from petitioner Board of Regents (Board), respondent practitioner applied to the Board for a waiver of the examination requirement. In November 1971, the Board notified respondent that her waiver application was denied, but respondent was not afforded an evidentiary hearing or given a statement of reasons for the denial. In January 1972, respondent commenced state-court proceedings, attacking the Board's decision as arbitrary and capricious but not raising any constitutional challenge to the decision. Ultimately, in November 1975, the New York Court of Appeals affirmed an order holding that the Board had not abused its discretion in denying respondent's waiver application. In June 1976, respondent instituted this action in Federal District Court under 42 U. S. C. § 1983, alleging that petitioners' refusal to grant her a license violated due process as guaranteed by the Fourteenth Amendment. Holding that the § 1983 action was not barred by the applicable 3-year New York statute of limitations even though respondent's claim arose in November 1971 when her waiver application was denied by the Board, the District Court concluded that it was appropriate to adopt a federal rule to toll the running of the statute of limitations during the pendency of respondent's state-court litigation. Under the New York tolling rule the time for filing an action is not tolled during the period in which a litigant pursues a related but independent cause of action. On the merits of the federal constitutional claim, the District Court held that respondent was entitled to a hearing before the Board on her eligibility for waiver of the examination requirement. The Court of Appeals affirmed as to both the statute of limitations issue and the merits.

Held: Respondent's action was barred by the New York statute of limitations. The federal courts were obligated not only to apply the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations. *Robertson* v. *Wegmann*, 436 U. S. 584; *Johnson* v. *Railway*

Express Agency, Inc., 421 U. S. 454; *Monroe* v. *Pape*, 365 U. S. 167. Pp. 483–492.

(a) Under 42 U. S. C. § 1988, federal courts are instructed to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983, and § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States." Since Congress did not establish a statute of limitations or a body of tolling rules applicable to federal-court actions under § 1983, the analogous state statute of limitations and the coordinate tolling rules are binding rules of law in most cases. This "borrowing" of the state statute of limitations includes rules of tolling unless they are "inconsistent" with federal law. Pp. 483–486.

(b) New York's tolling rule is not "inconsistent" with the policies of deterrence and compensation underlying § 1983. Neither of these policies are significantly affected by New York's rule since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years. And there is no need for nationwide uniformity so as to warrant displacement of state statutes of limitations for civil rights actions. Nor are policies of federalism undermined by adoption of the New York rule. When Congress establishes a remedy (such as § 1983) separate and independent from other remedies that might also be available, a state rule which does not allow a plaintiff to litigate such alternative claims in succession, without risk of a time bar, is not "inconsistent." Pp. 486–492.

603 F. 2d 255, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in the result, *post*, p. 492. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 494.

Donald O. Meserve argued the cause for petitioners. With him on the brief was *Jean M. Coon*.

Vincent J. Mutari argued the cause and filed a brief for respondent.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case, 444 U. S. 939, to review a judgment of the Court of Appeals for the Second Circuit

holding that petitioners, the Board of Regents of the University of the State of New York and the Commissioner of Education, were required by the Fourteenth Amendment to the United States Constitution, to afford a hearing to respondent, Mary Tomanio, before denying her request for a waiver of professional licensing examination requirements. In so doing, the Court of Appeals rejected petitioners' claims that both the statute of limitations and the doctrine of estoppel by judgment barred respondent's maintenance of an action under 42 U. S. C. § 1983 in the federal courts. We find it necessary to consider only the defense based on the statute of limitations, since the resolution of that issue is virtually foreordained in favor of petitioners by our prior cases when the indisputably lengthy series of events which ultimately brought this case here is described.

I

Respondent has practiced chiropractic medicine in the State of New York since 1958. Prior to 1963, the State did not require chiropractic practitioners to be licensed. But in that year the State enacted a statute which required state licensing, and established three separate methods by which applicants could obtain a license to practice chiropractic in the State of New York. 1963 N. Y. Laws, ch. 780, codified as amended, N. Y. Educ. Law §§ 6506 (5), 6554, 6556 (McKinney 1972 and Supp. 1979–1980). First, the statute established education and examination requirements for applicants who had not previously engaged in chiropractic practice. An alternative qualifying examination was made available to individuals already engaged in practice in New York on the date that the licensing statute became effective. Finally, the Act established a third means for current practitioners to qualify without taking any state-administered examination. Under § 6506 (5), they could obtain a waiver of "education, experience and examination requirements for a professional license . . . provided the board of regents shall be satisfied

that the requirements of such article have been substantially met." [1]

Respondent has been unsuccessful in her efforts to obtain a license to practice in New York. On seven separate occasions between 1964 and 1971, she attempted to qualify by taking the special examinations designed for current practitioners. Respondent failed, by a narrow margin, to ever receive a passing score on the examinations.[2] After this series of failures, she applied to the Board of Regents for waiver of the examination requirements pursuant to § 6506 (5). This application was based upon her claim that she had failed the examinations by only a very narrow margin, that she was licensed in the States of Maine and New Hampshire, and that she had passed an examination given by the National Board of Chiropractic Examiners. On November 22, 1971, the Board notified respondent that they had voted to deny her application for a waiver at a meeting held on November 19. Respondent was not afforded an evidentiary hearing on the denial of the waiver or given a statement of reasons for it.

In January 1972, respondent commenced a proceeding in the New York state courts attacking the decision of the Board of Regents not to grant a waiver as arbitrary and capricious, and seeking an order directing the Board to license her. She did not raise any constitutional challenge to the Board's decision in this judicial proceeding. The trial court granted the requested relief, but its order was reversed by the Appellate Division. In November 1975, the New York State Court of Appeals affirmed the order of the Appellate Division holding that the Board of Regents had not abused their discretion in denying respondent's application for a waiver. *Tomanio* v. *Board of Regents,* 38 N. Y. 2d 724, 343 N. E. 2d 755 (1975),

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[1] This waiver section is available to all applicants for professional licenses and not just those seeking admission to the practice of chiropractic.

[2] In 1972, respondent also took, and failed, the examinations administered to applicants without prior experience in practice.

aff'g 43 App. Div. 2d 643, 349 N. Y. S. 2d 806 (3d Dept. 1973).

Seven months later, on June 25, 1976, respondent instituted this action in Federal District Court under 42 U. S. C. § 1983. Respondent alleged that the refusal of petitioners to grant her a license to practice violated due process as guaranteed by the Fourteenth Amendment. Petitioners invoked res judicata and the statute of limitations as affirmative defenses to respondent's action.

The District Court rejected these defenses. First, the court found that res judicata would not bar consideration of a § 1983 claim in federal court if the constitutional claim was not actually litigated and determined in the prior state-court proceeding. Since respondent had not raised any constitutional challenge to the Board's action in state court, the trial court ruled that res judicata did not preclude the federal action.

The District Court also found that the § 1983 action was not barred by the statute of limitations. Respondent's claim arose in November 1971 when her application for waiver was denied, more than three years prior to the date on which the suit in federal court was commenced. Although the District Court found that a 3-year New York statute of limitations was applicable to respondent's action, the court held that it was appropriate to toll the running of that statute during the pendency of her state-court litigation. Relying on *Mizell* v. *North Broward Hospital District*, 427 F. 2d 468 (CA5 1970), the judge concluded that a federal tolling rule was appropriate, reasoning that

> "[i]n my judgment, the present overburdening of the federal courts and the increased filings of civil rights complaints are factors that mitigate in favor of encouraging the utilization of effective and feasible administrative and judicial remedies, which exist under state law, in certain situations."

Since respondent had diligently pursued her state-court

remedy after the denial of waiver, and then diligently pursued her federal action after a final dismissal of her state-law claims in the New York State Court of Appeals, the judge found that "it cannot be said that plaintiff has slept on her rights." On the merits of the federal constitutional claim, the District Court found that respondent was entitled to a hearing before the Board, relief which was more limited than she had sought. The Court of Appeals for the Second Circuit affirmed the District Court in its rejection of estoppel by judgment and the statute of limitations defense, finding that the tolling of the statute was justified "in the interests of advancing the goals of federalism." 603 F. 2d 255. The court also agreed with the ruling of the District Court that respondent was entitled, as a matter of federal constitutional law, to a hearing before the Board on her eligibility for waiver of the examination requirements.

In unraveling this tangle of federal and state claims, and federal- and state-court judgments, we have decided that the case is best disposed of by resolving the statute of limitations question, which we believe has been all but expressly resolved against the respondent by our decisions in *Robertson* v. *Wegmann*, 436 U. S. 584 (1978); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975); and *Monroe* v. *Pape*, 365 U. S. 167 (1961). Under the reasoning of these decisions, the federal courts were obligated not only to apply the analogous New York statute of limitations to respondent's federal constitutional claims, but also to apply the New York rule for tolling that statute of limitations.

II

Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983—a void which is commonplace in federal statutory law. When such a void occurs, this Court has repeatedly "borrowed" the state law of limitations governing an analo-

gous cause of action.[3] Limitation borrowing was adopted for civil rights actions filed in federal court as early as 1914, in *O'Sullivan* v. *Felix*, 233 U. S. 318. Although the Court of Appeals found that respondent's action was governed by a 3-year New York statute of limitations,[4] the court did not apply the New York rules governing the circumstances under which that statute of limitations could be tolled.

In § 1983 actions, however, a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law. In 42 U. S. C. § 1988, Congress "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983.[5] *Robertson* v. *Wegmann, supra.* See

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[3] See, *e. g.*, the authorities cited in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 462 (1975).

[4] The Court of Appeals for the Second Circuit established a number of years ago that New York's 3-year time limitation for actions "to recover upon a liability, penalty or forfeiture created or imposed by statute," N. Y. Civ. Prac. Law § 214 (2) (McKinney Supp. 1979–1980), governs § 1983 actions brought in Federal District Court in New York. *Romer* v. *Leary*, 425 F. 2d 186 (1970); *Meyer* v. *Frank*, 550 F. 2d 726, cert. denied, 434 U. S. 830 (1977). While petitioners suggest that § 217 (McKinney 1972) of the New York statutes of limitations, requiring the commencement of proceedings to review administrative action within four months, more appropriately governs this action, we need only hold that the Court of Appeals erred by tolling the 3-year limitation. The respondent does not maintain that a limitation period longer than three years governs this action. Thus we may assume for the purposes of this opinion that the 3-year period was applicable since respondent is in any event barred.

[5] Section 1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this [Chapter and Title 18], for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

also *Carlson* v. *Green, ante,* at 22, n. 10. As we held in *Robertson,* by its terms, § 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is "inconsistent with the Constitution and laws of the United States."

In another action subject to § 1988, we held that the state statute of limitations and the state tolling rules governed federal actions brought under 42 U. S. C. § 1981 except when "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* v. *Railway Express Agency, Inc., supra,* at 465. We there restated the general principle that since there was no specifically stated or otherwise relevant federal statute of limitations for the federal substantive claim created by Congress in that case, "the controlling period would ordinarily be the most appropriate one provided by state law." 421 U. S., at 462, and cases cited therein. We went on to observe that this "borrowing" logically included rules of tolling:

> "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling,

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against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

> revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim." *Id.*, at 463–464.

As *Robertson* and *Johnson* make clear, therefore, resolution of this case requires us to identify the New York rule of tolling and determine whether that rule is "inconsistent" with federal law.

III

New York has codified the limitations of actions and the circumstances under which those limitations can be tolled together. N. Y. Civ. Prac. Law §§ 201–218 (McKinney 1972 and Supp. 1979–1980). The general rule is set forth unambiguously in § 201 (McKinney 1972): "An action . . . must be commenced within the time specified in this article. . . . No court shall extend the time limited by law for the commencement of an action." The statute codifies a number of the tolling rules developed at common law.[6] No section of the law provides, however, that the time for filing a cause of action is tolled during the period in which a litigant pursues a related, but independent cause of action.[7] If a plaintiff wishes to pursue his claims in succession, rather than concurrently, the legislature has required the plaintiff either to obtain a

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[6] See, *e. g.*, § 207 (McKinney 1972) (tolling during defendant's absence from State or residence under false name); § 208 (McKinney Supp. 1979–1980) (tolling during period in which plaintiff is under a disability such as infancy, insanity, or imprisonment).

[7] Section 204 (b) does provide that if a plaintiff attempts to submit a claim for arbitration, but it is ultimately held that there is no obligation to arbitrate, the limitations period will not run during the time between the date of demand and the date of the judgment providing that arbitration is unavailable. This section does not provide for general tolling during arbitration, but only in situations where the plaintiff is unable to obtain an adjudication on the merits because the remedy is legally unavailable.

judicial stay of the time for commencing an action, or to litigate at risk. See § 204. The New York Legislature has apparently determined that the policies of repose underlying the statute of limitations should not be displaced by whatever advantages inure, whether to the plaintiff or the system, in a scheme which encourages the litigation of one cause of action prior to another.

Respondent's failure to comply with the New York statute of limitations, therefore, precluded maintenance of this action unless New York's tolling rule is "inconsistent" with the policies underlying § 1983.[8] In order to gauge consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared. On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. Making out the substantive elements of a claim for relief involves a process of pleading, discovery, and trial. The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious. By the same token, most courts and legislatures have recognized that there are factual circumstances which justify an exception to these strong policies of repose. For example, defendants may not, by tactics of evasion, prevent the plaintiff from litigating the merits of a claim, even though

[8] We note that respondent does not maintain that any provision of New York law operated to toll the statute of limitations.

on its face the claim is time-barred. These exceptions to the statute of limitations are generally referred to as "tolling" and, as more fully discussed in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975), are an integral part of a complete limitations policy.

The importance of policies of repose in the federal, as well as in the state, system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless "borrowed" what it considered to be the most analogous state statute of limitations to bar tardily commenced proceedings. *Supra*, at 483–484. This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established. Thus, in general, state policies of repose cannot be said to be disfavored in federal law. Nonetheless, it is appropriate to determine whether Congress has departed from the general rule in § 1983.

In *Robertson* v. *Wegmann*, 436 U. S. 584 (1978), the Court first emphasized that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant." *Id.*, at 593. The Court went on to identify two of the principal policies embodied in § 1983 as deterrence and compensation. Neither of these policies is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years.

Uniformity has also been cited as a federal policy which sometimes necessitates the displacement of an otherwise applicable state rule of law. *Carlson* v. *Green, ante,* p. 14; *Occidental Life Ins. Co. of California* v. *EEOC,* 432 U. S. 355, 362 (1977). The need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions. *Johnson* v. *Railway Express Agency, Inc., supra.* In *Robertson* v. *Wegmann, supra,* we held:

> "[W]hatever the value of nationwide uniformity in areas of civil rights enforcement where Congress has not spoken, in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues." 436 U. S., at 594, n. 11.

The Court of Appeals and the District Court in this case apparently believed that policies of federalism would be undermined by the adoption of the New York tolling rule since litigants would not be encouraged to resort to state remedies prior to the maintenance of a federal civil rights action under § 1983. The conclusion of the lower courts that this result would be "inconsistent" with federal law is at odds with the reasoning in our prior opinions in this field as well as at odds with federalism itself.

On several prior occasions, we have reasoned that when Congress intended to establish a remedy separate and independent from other remedies that might also be available, a state rule which does not allow a plaintiff to litigate such alternative claims in succession, without risk of a time bar, is not "inconsistent." In *Johnson* v. *Railway Express, supra,* the Court found that a state rule which did not toll the statute of limitations applicable to a claim under 42 U. S. C. § 1981 during the pendency of a charge under Title VII of the Civil

Rights Act of 1964 filed with the Equal Employment Opportunity Commission, was not inconsistent with § 1981 because Congress had "retained § 1981 as a remedy . . . separate from and independent of the . . . procedures of Title VII." 421 U. S., at 466. The Court premised its conclusion that Title VII and § 1981 were separate and independent on the fact that Congress had not required resort to Title VII as a prerequisite to an action under § 1981 and did not "expect that a § 1981 court action usually would be resorted to only upon a completion of Title VII procedures. . . ." 421 U. S., at 461. Adopting the same reasoning, we held in *Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U. S. 229 (1976), that it would not be inconsistent with Title VII to decline to toll the statute of limitations during labor grievance or arbitration procedures *because* "contractual rights under a collective-bargaining agreement and the statutory right provided by Congress under Title VII 'have legally independent origins and are equally available to the aggrieved employee.'" *Id.*, at 236, quoting *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 52 (1974). Applying the converse of this reasoning, this Court found in *Occidental Life Ins. Co. of California* v. *EEOC*, *supra*, that it *would* be inconsistent with federal law to apply a state statute of limitations to actions instituted by the EEOC under Title VII since the EEOC was "required by law to refrain from commencing a civil action until it ha[d] discharged its administrative duties." 432 U. S., at 368.

The District Court's conclusion that state remedies should be utilized before resort to the federal courts may be an entirely sound and sensible observation, but in our opinion it does not square with what must be presumed to be congressional intent in creating an independent federal remedy. Unless that remedy is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had, see *Love* v. *Pullman Co.*, 404 U. S. 522 (1972), it cannot be assumed that Congress wishes to hold open the independent federal remedy

during any period of time necessary to pursue alternative state-court remedies. It is difficult to conclude that a state policy of repose which likewise does not encourage litigants to resort to other available remedies is inconsistent with such congressional intent. We find the congressional intent here to be virtually indistinguishable from that found in *Johnson* v. *Railway Express, supra,* and *Electrical Workers* v. *Robbins & Myers, Inc., supra,* to be consistent with a rule prohibiting tolling.

As in those cases, there is no question that respondent's § 1983 action was "separate and independent" from the state judicial remedy pursued in state court.[9] This Court has not interpreted § 1983 to require a litigant to pursue state judicial remedies prior to commencing an action under this section. In *Monroe* v. *Pape,* 365 U. S., at 183, we held: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Thus the very independence of § 1983 reveals that the New York rule precluding tolling in the circumstances of this case is not "inconsistent" with the provisions of § 1983.

Finally, we do not believe that this construction of congressional intent is overridden, as the Court of Appeals found, "in the interests of advancing the goals of federalism." We believe that the application of the New York law of tolling is in fact more consistent with the policies of "federalism" invoked by the Court of Appeals than a rule which displaces

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[9] The remedy pursued by plaintiff in state court was a state judicial remedy authorizing actions against administrative bodies to review "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. . . ." N. Y. Civ. Prac. Law § 7803 (McKinney 1963). While the parties and the courts below were in agreement that a constitutional challenge to the agency action could have been brought under Art. 78, only the state-law claims were pursued by respondent in that proceeding.

the state rule in favor of an ad hoc federal rule. The result reached by the District Court and Court of Appeals might encourage more plaintiffs with both state and federal constitutional claims to initially bring an action in the state courts. But it would just as surely frustrate the often complex combination of limitations and tolling provisions enacted by the State in question. While New York might have chosen a tolling rule designed to encourage prior resort to state-law remedies, it has not. Here New York has expressed by statute its disfavor of tolling its statute of limitations for one action while an independent action is being pursued. Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U. S. C. § 1983. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37 (1971). But the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature.

Since we therefore hold that respondent's action was barred by the New York statute of limitations, we find it unnecessary to reach petitioners' other contentions. The judgment of the Court of Appeals is accordingly

Reversed.

MR. JUSTICE STEVENS, concurring in the result.

The federal claim asserted by respondent was that New York had deprived her of the right to practice her profession without the due process of law required by the Fourteenth Amendment to the United States Constitution.[1] The New York proceedings that ultimately determined that she had no such right as a matter of state law were not concluded until November 1975. Since her federal action was filed only seven months later, I believe it was timely, though for somewhat different reasons than those stated by the Court of Appeals.

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[1] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U. S. Const., Amdt. 14, § 1.

Having relied on developments in the state-court litigation to defend the merits of respondent's due process challenge,[2] I would not permit the State simultaneously to contend that all aspects of the federal controversy had crystalized before respondent sought review in the state court system. Cf. *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1319 (CA7 1975), modified, 545 F. 2d 565 (1976) (en banc), cert. denied, 435 U. S. 932. As the Court notes, *ante*, at 491, a litigant is not required to exhaust state remedies before bringing a § 1983 action in federal court. *Monroe* v. *Pape*, 365 U. S. 167, 183. But I would not penalize a litigant who decides to bring suit in the state courts first; for such a decision gives the State an opportunity to correct, through construction of state law, a potential constitutional error, and may obviate entirely any need to present the claim to a federal court. It would also make no sense to me in terms of either federalism or judicial administration to require a litigant who files an action in state court to proceed simultaneously in federal court in order to avoid a time bar. I therefore disagree with the Court's holding that respondent's claim is barred by limitations.[3]

On the merits, however, I am not persuaded that New York's licensing procedure is unfair. Examinations are a permissible method of determining qualifications, and lines must be drawn somewhere. The fact that respondent was just short of the passing mark does not raise any federal question. Indeed, respondent does not claim that the examination itself denied her due process. And I agree with Judge Lumbard, who dissented in the Court of Appeals, that the fact that

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[2] Petitioners rely on the papers in the New York action as having provided respondent with an adequate statement of the reasons for the denial of a waiver. See Brief for Petitioners 4.

[3] Even if I agreed with the view that the federal claim was complete in November 1971 when respondent's application for a waiver was denied, I would remand to the Court of Appeals to determine the state-law tolling issue rather than have this Court decide that state-law question in the first instance.

New York has provided for a waiver in the discretion of the Board of Regents does not substantially change the State's licensing procedure. Respondent was given an adequate opportunity to advise the Board of the reasons why she should receive a waiver and she ultimately received an adequate explanation for the refusal. She does not allege that others who have failed the examination have obtained a waiver, or, indeed, any facts suggesting any arbitrariness in the New York procedure.

In short, I find no merit in respondent's constitutional challenge and would reverse for that reason.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I cannot agree with the Court that respondent's federal action is time-barred. In my view, when applied to these facts the New York statute of limitations and tolling rules are "inconsistent with the Constitution and laws of the United States," and thus should not be "extended to . . . govern" respondent's suit. 42 U. S. C. § 1988.

While the precise content of New York's statute of limitations and tolling rules is not crucial to my analysis, I think it appropriate to note that the Court's conclusion that respondent's action would be time-barred under state law is far from persuasive. The Court relies heavily upon the absence of any provision that expressly tolls the statute of limitations "during the period in which a litigant pursues a related, but independent cause of action," *ante*, at 486.[1] I would not attach controlling significance to the absence of particular statutory language. Nor would I conclude on the basis of that absence that New York had consciously determined "that the policies of repose underlying the statute of

[1] The Court also makes reference to respondent's failure to "maintain that any provision of New York law operated to toll the statute of limitations." *Ante*, at 487, n. 8.

limitations should not be displaced by whatever advantages inure, whether to the plaintiff, or the system, in a scheme which encourages the litigation of one cause of action prior to another." *Ante*, at 487. Legislative silence is simply not that communicative.[2] Indeed, there may be no New York rule that actually deals with the present situation. That State has a unitary court system, and in consequence its judges and legislators are unlikely to have focussed upon the filing in two different court systems of two different suits dealing with the same transaction or occurrence. Further, the situation upon which they probably have focussed—the filing in a single system of two consecutive suits—would not really be analogous because there would be no conceivable reason for separating the actions. Moreover, even in that case it is not clear that state lawmakers would expect to derail the second action by applying the statute of limitations. On the contrary, the doctrine of res judicata would seem a more probable reason for dismissal.[3] In sum, I think the precise content of state law when applied to a case such as the present one is sufficiently opaque to render any supposition as to what state policies are at stake extremely speculative.[4]

More broadly, I would not find respondent's § 1983 action time-barred even were I confident that application of the New York rules would produce that result. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961), settled that the plaintiff in a § 1983 case need not resort to state judicial remedies prior to filing a federal suit. There are, however, circumstances in

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[2] Cf. Powell, The Still Small Voice of the Commerce Clause, in 3 Selected Essays on Constitutional Law 931, 932 (1938).

[3] See *Winters* v. *Lavine*, 574 F. 2d 46, 56 (CA2 1978) (citing New York cases).

[4] If the Court is persuaded that state law should govern, I agree with MR. JUSTICE STEVENS that it would be appropriate to seek the advice of the Court of Appeals as to the precise content of the state rule as applied to facts such as these. *Ante*, at 493, n. 3.

which this Court has decided that a federal determination may be delayed pending resolution of certain state-law issues, see *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941). Beyond that, even in cases not technically within the abstention doctrine, advantages may be realized from permitting the state courts to decide claims that state administrative determinations were arbitrary, capricious, or otherwise contrary to state law. Accordingly, I can conceive of situations in which a plaintiff in a case like the present one might resort initially to state courts either under the view that he would be required to do so by the abstention doctrine or because doing so, while not compulsory, would be a more efficacious way of resolving his claim. Either reason strikes me as entirely legitimate.[5] Abstention decisions are presumably there to be read by plaintiffs as well as district courts, and permitting plaintiffs to act upon them might spare the federal courts some unnecessary work. More generally, where the plaintiff voluntarily concludes that it is worth the time and money, resort to state judicial review under state law would not be inconsistent with *Monroe* v. *Pape*, *supra*, and could both reduce strains on federal-state relations and ease the task facing the district courts that must eventually resolve those cases not settled in state proceedings.

While I believe the foregoing benefits may be substantial, I think it vital to ensure that they are not obtained at the expense of the plaintiff's right ultimately to try his federal claims in a federal forum. Thus, while I recognize that a plaintiff may be bound by a deliberate choice to present both state and federal claims to the state court, I would not be too quick to find that such a choice has been made. In the present case, there is no indication that respondent had any intention of relinquishing her right to a federal forum, and I would eschew any course that in effect forces her to do so.

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[5] In this regard, too, I am in agreement with my Brother STEVENS. See *ante*, at 493.

In consequence, on these facts I would think it inconsistent with federal law and the Constitution to enforce state timing or res judicata rules that close the door of the federal courthouse.

In the abstention context, *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964), sets forth a procedure for preserving a plaintiff's right to a federal forum for his federal claims while giving effect to the concerns and policies underlying *Railroad Comm'n* v. *Pullman Co., supra.* Under that procedure, a plaintiff remitted to state court may file a formal reservation in that court preserving his federal claims. If he does so, he can litigate those claims on his return to federal court. If he fails to do so, he risks being held to have submitted all his claims to the state court. It seems to me that the present case is in many respects simply a variation of the basic *England* situation. Accordingly, I believe that a similar reservation procedure would be appropriate here. Permitting a plaintiff to reserve his federal claims would make the choice to litigate state claims in state court a palatable one; and where that choice is exercised the parties and system alike may benefit. Further, requiring that plaintiffs who want to make such a reservation do so expressly would supply a relatively simple means of preventing the relitigation of claims submitted to and decided by state courts.[6]

[6] Curiously, the Court's decision regarding the New York statute of limitations could have a broadly parallel effect. As I understand it, the Court would simply require plaintiffs either to lodge a federal complaint in federal court before the limitations period expires or to obtain an order from the state court tolling the running of that period. Either step would put the State on notice that a federal constitutional challenge loomed, cf. *Government Employees* v. *Windsor*, 353 U. S. 364 (1957), and, assuming that the Court would not give effect to the state res judicata rules, either would ultimately permit plaintiffs in future cases to raise their federal claims in federal forums. Thus, while I am not persuaded by the Court's reasoning, and while I think the result in this particular case anomalous, the overall effect of the Court's rule may be satisfactory.

While I would impose a reservation requirement on cases like this for the future, I would not be inclined to do so on the present facts for reasons akin to those that led us to make *England* itself prospective. 375 U. S., at 421–423. Specifically, there is no reason why respondent should have anticipated that she would be required to reserve her federal questions. On the contrary, I think she could reasonably have assumed that so long as her federal claims were not raised or decided in state court she could try them in a subsequent § 1983 action.[7] I would give effect to that assumption and make the reservation requirement wholly prospective.[8]

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[7] In 1970 the Court of Appeals for the Fifth Circuit concluded that a state statute of limitations would be tolled in such a situation. *Mizell* v. *North Broward Hospital District*, 427 F. 2d 468, 473–474. The Court of Appeals for the Second Circuit apparently had not ruled on this precise issue at the time of respondent's suit, although it had held that New York's res judicata and collateral estoppel rules would not bar a federal civil rights suit dealing with issues not actually litigated in a prior state-court suit, *Ornstein* v. *Regan*, 574 F. 2d 115 (1978); *Lombard* v. *Board of Education*, 502 F. 2d 631, 635–637 (1974).

[8] Even were the *England* requirement fully applicable, respondent's failure to make an express reservation might not be dispositive on these facts. Normally the reservation rule will serve two functions—it will force the plaintiff to declare his intentions, and thus keep him from getting two chances to litigate a single claim, and it will put the parties and the state court on notice that there lurks a constitutional issue. Here the first purpose is not implicated because respondent's federal claims were not litigated in state court. And while it may be appropriate to hold that a plaintiff who fails to reserve federal claims will be bound by a state court's actual determination of those claims, the proper result where a failure to reserve has led only to silence on the federal issue is less obvious. *Government Employees* v. *Windsor*, *supra*, for example, merely concluded that a state-law determination made without warning or discussion of related constitutional claims was inadequate and ordered a remand to give the state courts an opportunity to construe their statute in a different manner. 353 U. S., at 366. Neither party has requested such a disposition here, and I am not convinced that one would be appropriate. But it does seem that the consequence of failure to reserve in the present

Because I think the importation of either the state statute of limitations or its estoppel-by-judgment rule would be inconsistent with federal law and the Constitution, I would reach the merits. The courts below were of the view that the licensing scheme in general and the waiver provisions in particular conferred on respondent some minimal property right. I see no reason to second-guess that determination.[9] As a result, it is axiomatic that some procedural protections are required by the Due Process Clause. The extent of those protections is a difficult question, and I think the Court of Appeals may have gone too far when it ordered an adjudicative hearing. It does, however, seem quite clear that at minimum respondent was entitled to a statement of the reasons for her rejection. Further, I cannot agree with MR. JUSTICE STEVENS that this requirement was satisfied by the statement given by the Board in its answer to respondent's original complaint. Respondent's right was to receive a statement of reasons when a waiver was denied, not upon her resort to state judicial remedies.[10] As a result, I would affirm the Court of Appeals insofar as it held that respondent was entitled as a matter of federal constitutional law to some additional procedures, but would reverse insofar as that court held that she was entitled to a full adjudicative hearing. Accordingly, I dissent.

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context need not be a complete bar to pursuit of respondent's federal claims in federal court.

[9] In the wake of *Bishop* v. *Wood*, 426 U. S. 341, 347 (1976), it is clear that such second-guessing will rarely if ever be appropriate.

[10] Cf. *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S. 278 (1913).

ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1522. Argued December 5, 1979—Decided May 19, 1980

Section 7 of the Taylor Grazing Act, as amended in 1936, authorizes the Secretary of the Interior (Secretary), in his discretion, to classify, as proper not only for homesteading but also for satisfaction of any outstanding "lieu" rights, both lands within federal grazing districts and any unappropriated and unreserved public lands withdrawn by Executive Order from "settlement, location, sale or entry" pending a determination of the best use of the lands, and to open all such lands to "selection." Section 7 further provides that such lands shall not be subject to disposition until they have been classified. Pursuant to § 7, the Secretary refused Utah's selection of extremely valuable oil shale lands located within federal grazing districts in lieu of and as indemnification for original school land grants of significantly lesser value that were frustrated by federal pre-emption or private entry prior to being surveyed. In so acting, the Secretary followed the policy that, in the exercise of his discretion under § 7, indemnity applications involving grossly disparate values would be refused. Utah filed suit in Federal District Court, which, upon stipulated facts, entered summary judgment for the State. The Court of Appeals affirmed, holding that § 7 gave the Secretary no authority to classify land as eligible for selection and that Utah had a right to select indemnity land of equal acreage without regard to the relative values of the original school land grants and the indemnity selections.

Held: Section 7 confers on the Secretary the authority, in his discretion, to classify lands within a federal grazing district as proper for school indemnity selection. His "grossly disparate value" policy is a lawful exercise of the broad discretion vested in him by § 7 and is a valid ground for refusing to accept Utah's selections. Such policy is wholly faithful to Congress' consistent purpose, in providing for indemnity selections, of giving the States a rough equivalent of the school land grants in place that were lost through pre-emption or private entry prior to survey. Pp. 506–520.

586 F. 2d 756, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dis-

senting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 520.

Peter Buscemi argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne*, and *Carl Strass*.

Richard L. Dewsnup, Assistant Attorney General of Utah, argued the cause for respondent. With him on the brief were *Robert B. Hansen*, Attorney General, and *Dallin W. Jensen, Michael M. Quealy*, and *Paul E. Reimann*, Assistant Attorneys General.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The State of Utah claims the right to select extremely valuable oil shale lands located within federal grazing districts in lieu of and as indemnification for original school land grants of significantly lesser value that were frustrated by federal pre-emption, or private entry, prior to survey. The question presented is whether the Secretary of the Interior is obliged to accept Utah's selections of substitute tracts of the

*Briefs of *amici curiae* urging affirmance were filed by *George Deukmejian*, Attorney General of California, *N. Gregory Taylor* and *Jan S. Stevens*, Assistant Attorneys General, and *Stephen H. Mills*, Deputy Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *J. D. MacFarlane*, Attorney General of Colorado, *John F. North*, Special Assistant Attorney General of Montana, *Richard H. Bryan*, Attorney General of Nevada, *Jeff Bingaman*, Attorney General of New Mexico, and *William O. Jordan*, Special Assistant Attorney General, *James A. Redden*, Attorney General of Oregon, and *Peter S. Herman, Slade Gorton*, Attorney General of Washington, and *Theodore O. Torve* and *J. Lawrence Coniff, Jr.*, Assistant Attorneys General, and *John D. Troughton*, Attorney General of Wyoming, for the State of California et al.; and by *David H. Leroy*, Attorney General of Idaho, and *W. Hugh O'Riordan*, Deputy Attorney General, for the State of Idaho.

Briefs of *amici curiae* were filed by *Richard C. Cahoon* for Justheim Petroleum Co.; and by *Stephen G. Boyden* and *Scott C. Pugsley* for the Ute Indian Tribe of the Uintah and Ouray Reservation.

same size as the originally designated sections even though there is a gross disparity between the value of the original grants and the selected substitutes. We hold that the Secretary's "grossly disparate value" policy is a lawful exercise of the broad discretion vested in him by § 7 of the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended in 1936, 49 Stat. 1976, 43 U. S. C. § 315f, and is a valid ground for refusing to accept Utah's selections.

Utah became a State in 1896. In the Utah Enabling Act of 1894, Congress granted Utah, upon admission, four numbered sections in each township for the support of public schools. The statute provided that if the designated sections had already "been sold or otherwise disposed of" pursuant to another Act of Congress, "other lands equivalent thereto . . . are hereby granted." The substitute grants, denominated "indemnity lands" were "to be selected within the State in such manner as [its] legislature may provide with the approval of the Secretary of the Interior." [1]

Because much of the State was not surveyed until long after its admission to the Union, its indemnity or "in lieu" selections were not made promptly. On September 10, 1965,

[1] "That upon the admission of said State [Utah] into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other *lands equivalent thereto*, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such *indemnity lands* to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." 28 Stat. 109 (emphasis added).

Utah filed the first of 194 selection lists with the Bureau of Land Management of the Department of the Interior covering the land in dispute in this litigation. The 194 indemnity selections include 157,255.90 acres in Uintah County, Utah, all of which are located within federal grazing districts created pursuant to the Taylor Grazing Act.

In January 1974, before Utah's selection lists had been approved or disapproved, the Governor of Utah agreed that the Secretary of the Interior could include two tracts comprising 10,240 acres of selected indemnity lands in an oil shale leasing program, on the understanding that the rental proceeds would ultimately be paid to the State if its selections were approved. The proceeds of the leases are of substantial value.[2]

In February 1974, the Secretary advised the Governor that he would not approve any indemnity applications that involved "grossly disparate values." [3] He wrote:

> "As you know, the Department of the Interior has not as yet acted upon the State's [indemnity] applications. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U. S. C. § 315f (1972), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secre-

[2] The District Court found that as of May 25, 1976, $48,291,840 had been accumulated. App. to Pet. for Cert. 62a. It should be noted that these proceeds were derived from only 10,240 acres out of the total area selected comprising over 157,000 acres.

[3] Suggested guidelines of the Department of the Interior provide that the policy will not be applied unless the estimated value of the selected lands exceeds that of the base lands by more than $100 per acre or 25% whichever is greater. If the values are grossly disparate using those criteria, the case will be submitted to the Washington office for evaluation of all the circumstances. App. 44–45.

tary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia*, Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.

"In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate at this time to advise you that we will apply the above-mentioned policy in that adjudication." [4]

The State promptly filed this action in the United States District Court for the District of Utah. The facts were stipulated, and Judge Ritter entered summary judgment in favor of the State. He held that if Utah's selections satisfy all of the statutory criteria governing indemnity selections when filed,[5] the Secretary has no discretion to refuse them

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[4] Letter of February 14, 1974, from Rogers Morton, Secretary of the Interior, to Calvin Rampton, Governor of the State of Utah. *Id.*, at 61.

[5] The statute provides, in part:

"§ 851. Deficiencies in grants to State by reason of settlements, etc., on designated sections generally

"Where settlements with a view to preemption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State, in lieu of such as may be thus taken by preemption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, before title could pass to the State, included within any

pursuant to a "grossly disparate value" policy. The Court of Appeals for the Tenth Circuit affirmed, *Utah* v. *Kleppe*, 586 F. 2d 756 (1978), holding that § 7 of the Taylor Grazing

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Indian, military, or other reservation, or are, before title could pass to the State, otherwise disposed of by the United States: *Provided*, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: *Provided, however*, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein." 43 U. S. C. § 851.

"§ 852. Selections to supply deficiencies of school lands

"(a) Restrictions

"The lands appropriated by section 851 of this title shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur subject to the following restrictions:

"(1) No lands mineral in character may be selected by a State except to the extent that the selection is being made as indemnity for mineral lands lost to the State because of appropriation before title could pass to the State;

"(2) No lands on a known geologic structure of a producing oil or gas field may be selected except to the extent that the selection is being made as indemnity for lands on such a structure lost to the State because of appropriation before title could pass to the State; and

"(3) Land subject to a mineral lease or permit may be selected if none of the land subject to that lease or permit is in a producing or producible

Act gave the Secretary no authority to classify land as eligible for selection and that the State had a right to select indemnity land of equal acreage without regard to the relative values of the original grants and the indemnity selections.

Because the dispute between the parties involves a significant issue regarding the disposition of vast amounts of public lands,[6] we granted certiorari. 442 U. S. 928. We believe that the Court of Appeals and the District Court failed to give proper effect to the congressional policy underlying the provision for indemnity selection, and specifically misconstrued § 7 of the Taylor Grazing Act as amended in 1936. We therefore reverse.

I

The Enabling Act of each of the public-land States admitted into the Union since 1802 has included grants of designated sections of federal lands for the purpose of supporting public schools.[7] Whether the Enabling Act contained words of present

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status, subject, however, to the restrictions and conditions of the preceding and following paragraphs of this subsection." 43 U. S. C. § 852 (a).

Title 43 U. S. C. § 853 provides that in applying this statute to Utah, the words "sections sixteen and thirty-six" also include sections two and thirty-two.

[6] "Because the western states are the ones most recently admitted to the Union and because Utah and Arizona are two of the three states that received particularly large grants, the remaining indemnity selection rights are concentrated in seven western states. Utah and Arizona alone hold nearly 70% of the outstanding indemnity rights. The approximate number of acres still to be selected in each state (and thus the approximate number of acres potentially affected by this lawsuit) is as follows: Arizona, 170,000 acres; California, 108,000 acres; Colorado, 17,000 acres; Idaho, 27,000 acres; Montana, 22,900 acres; Utah, 225,000 acres; and Wyoming, 1,100 acres." Brief for Petitioner 4–5, n. 2.

[7] "The first enactment for the sale of public lands in the western territory provided for setting apart section sixteen of every township for the maintenance of public schools (Ordinance of 1785; *Cooper* v. *Roberts*, 18 How. 173, 177); and, in carrying out this policy, grants were made for common school purposes to each of the public-land States admitted to the Union. Between the years 1802 and 1846 the grants were

or future grant, title to the numbered sections did not vest in the State until completion of an official survey. Prior to survey, the Federal Government remained free to dispose of the designated lands "in any manner and for any purpose consistent with applicable federal statutes." [8] In recognition of the fact that the essentially random grants in place might therefore be unavailable at the time of survey for a variety of reasons,[9] Congress authorized grants of indemnity or "lieu" lands of equal acreage.

As Utah correctly emphasizes, the school land grant was a "solemn agreement" which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.

The State's right to select indemnity lands may be viewed as the remedy stipulated by the parties for the Federal Gov-

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of every section sixteen, and, thereafter, of sections sixteen and thirty-six. In some instances, additional sections have been granted." *United States* v. *Morrison*, 240 U. S. 192, 198 (footnotes omitted).

[8] "It has consistently been held that under the terms of the grants hitherto considered by this Court, title to unsurveyed sections of the public lands which have been designated as school lands does not pass to the State upon its admission into the Union, but remains in the Federal Government until the land is surveyed. Prior to survey, those sections are a part of the public lands of the United States and may be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes. If upon survey it is found that the Federal Government has made a previous disposition of the section, the State is then entitled to select lieu lands as indemnity in accordance with provisions incorporated into each of the school-land grants. The interest of the State vests at the date of its admission into the Union only as to those sections which are surveyed at that time and which previously have not been disposed of by the Federal Government." *United States* v. *Wyoming*, 331 U. S. 440, 443–444 (footnote omitted).

[9] These include the establishment of reservations for Indians or federal military purposes, and entries by individuals under the homestead laws. See, *e. g.*, *Wisconsin* v. *Lane*, 245 U. S. 427, 432–433.

ernment's failure to perform entirely its promise to grant the specific numbered sections. The fact that the Utah Enabling Act used the phrase "lands equivalent thereto" and described the substituted lands as "indemnity lands" implies that the purpose of the substitute selections was to provide the State with roughly the same resources with which to support its schools as it would have had had it actually received all of the granted sections in place.[10] Thus, as is typical of private contract remedies, the purpose of the right to make indemnity selections was to give the State the benefit of the bargain.

The history of the general statutes relating to land grants for school purposes confirms this view. Thus, for example, in 1859, when confronted with the fact that many settlers had occupied unsurveyed lands that had been included in school grants, Congress confirmed the settlers' claims and granted to the States "other lands of like quantity." Ch. 58, 11 Stat. 385. The substitution of an equal quantity of land provided the States a rough measure of equal value.

The school land grants gave the States a random selection of public lands subject, however, to one important exception. The original school land grants in general, and Utah's in particular, did not include any numbered sections known to be mineral in character by the time of survey. *United States* v. *Sweet*, 245 U. S. 563. This Court so held even though the Utah Enabling Act "neither expressly includes mineral lands nor expressly excludes them." *Id.*, at 567. The Court's opinion stressed "the practice of Congress to make a distinction between mineral lands and other lands, to deal with them

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[10] See *Heydenfeldt* v. *Daney Gold & Silver Mining Co.*, 93 U. S. 634, 639–640: "Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and *as near as may be in quality*." (Emphasis added.)

along different lines, and to withhold mineral lands from disposal save under laws specially including them." *Ibid.* Mineral lands were thus excluded not only from the original grants in place but also from the indemnity selections.[11] Since mineral resources provide both the most significant potential source of value and the greatest potential for variation in value in the generally arid western lands, the total exclusion of mineral lands from the school land grants is consistent with an intent that the States' indemnity selections of equal acreage approximate the value of the numbered sections lost.

In 1927, some nine years after the decision in *United States* v. *Sweet, supra,* Congress changed its policy to allow grants of school lands to embrace numbered sections that were mineral in character.[12] But the 1927 statute did not expand the kinds of land available for indemnity selections.[13] Thus, after 1927 even if the lost school lands were mineral in character, a State was prohibited from selecting mineral lands as indemnity. It was not until 1958 that Congress gave the States the right to select mineral lands to replace lost school lands, and that right was expressly conditioned on a determination that the lost lands were also mineral in character. 72 Stat. 928, 43 U. S. C. § 852. See n. 5, *supra.* For 30 years, then, States

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[11] Under the 1891 general indemnity selection statute then in effect, selections were limited to "unappropriated, surveyed public lands, not mineral in character." 26 Stat. 796–797.

[12] The Act of January 25, 1927, 44 Stat. 1026–1027, provided that "the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character." See 43 U. S. C. § 870.

[13] "[T]his Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect." 44 Stat. 1027, 43 U. S. C. § 871.

were not even permitted to select lands roughly equivalent in value to replace lost mineral lands. The condition in the 1958 statute, that the lost lands be mineral in character before mineral lands could be selected as indemnity, rather clearly reflects an intention to restore the character of the indemnity selection as a substitute of roughly equal value.[14]

Throughout the history of congressional consideration of school land grants and related subjects—a history discussed at great length in the voluminous briefs submitted to us—we find no evidence whatever of any congressional desire to have the right to select indemnity lands do anything more than make the States whole for the loss of value resulting from the unavailability of the originally designated cross section of lands within the State. There is certainly no suggestion of a purpose at any time, including 1958, to allow the States to obtain substantially greater values through the process of selecting indemnity land.

Thus, viewing the program in this broad historical perspective, it is difficult to identify any sensible justification for Utah's position that it is entitled to select any mineral lands it chooses regardless of the value of the school sections lost. Nevertheless, Utah is quite correct in arguing that the Secretary has no power to reject its selections unless Congress has given it to him. We have no doubt that it has.

II

Prior to the 1930's, cases in this Court had made it perfectly clear that the Federal Government retained the power to appropriate public lands embraced within school grants for other

[14] "Under present law the States are restricted to selecting non-mineral lands to replace forfeited school sections even when these sections are mineralized. There appears to be little equity in this situation." H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2 (1958). "The objective of this legislation is merely to make whole the States which have pending in lieu selections of lands for preempted school sections." Remarks of Senator Watkins of Utah, 104 Cong. Rec. 11921 (1958).

purposes if it acted in a timely fashion. On the other hand, it was equally clear that the States' title to unappropriated land in designated sections could not be defeated after survey, and that their right to indemnity selections could not be rejected if they satisfied the statutory criteria when made, and if the selections were filed before the lands were appropriated for other purposes. The authority of the Secretary of the Interior was limited to determining whether the States' indemnity selections met the relevant statutory criteria. See *Wyoming* v. *United States*, 255 U. S. 489; *Payne* v. *New Mexico*, 255 U. S. 367, 371.

In the 1930's, however, dissatisfaction with the rather loose regime governing use and disposition of unappropriated federal lands, prompted mostly by the waste caused by unregulated stock grazing,[15] led to a series of congressional and executive actions that are critical to this case. By means of these actions, all unappropriated federal lands were withdrawn from every form of entry or selection. The withdrawal did not affect the original school land grants in place, whether or not surveyed, but did include all lands then available for school indemnity selections. The lands thus withdrawn were thereafter available for indemnity selections only as permitted by the Secretary of the Interior in the exercise of his discretion.

The sequence of events was as follows. In 1934, Congress enacted the Taylor Grazing Act "[t]o stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes." 48 Stat. 1269. Section 1 authorized the Secretary of the Interior to establish grazing districts in up to 80 million acres of unappropriated federal lands; the establishment of such a district had the effect of withdrawing all lands within its boundaries "from all

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[15] See H. R. Rep. No. 903, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 11139 (1934) (remarks of Sen. Adams of Colorado).

forms of entry of settlement." [16] That section also expressly provided that "Nothing in this Act shall be construed in any way . . . to affect any land heretofore or hereafter surveyed

[16] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U. S. C., title 43, secs. 291 and following), commonly known as the 'Stock Raising Homestead Act', shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U. S. C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U. S. C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given,

which, except for the provisions of this Act, would be a part of any grant to any State. . . ." Thus, § 1 preserved the original school land grants, whether or not the designated sections had already been identified by survey, but the statute made no provision for school indemnity selections.[17]

Because the Taylor Grazing Act as originally passed in 1934 applied to less than half of the federal lands in need of more orderly regulation,[18] President Roosevelt promptly issued Ex-

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at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district." 48 Stat. 1269–1270.

[17] Section 7 of the Act authorized the Secretary

". . . in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: *Provided,* That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided." 48 Stat. 1272.

[18] The bill originally introduced by Congressman Taylor in 1934 (H. R. 6462, 73d Cong., 2d Sess.) purported to authorize the protection of 173

ecutive Order No. 6910 [19] withdrawing all of the unappropriated and unreserved public lands in 12 Western States, including Utah, from "settlement, location, sale or entry" pend-

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million acres of public range lands by including them within grazing districts. As enacted, however, the statute covered a maximum of 80 million acres. This figure was increased to 142 million acres in 1936, 49 Stat. 1976, and the acreage limitation was removed entirely in 1954. 68 Stat. 151.

[19] The Order, quoted in *Executive Withdrawal Order*, 55 I. D. 205, 206–207 (1935), reads as follows:

"WHEREAS, the act of June 28, 1934 (ch. 865, 48 Stat. 1269), provides, among other things, for the prevention of injury to the public grazing lands by overgrazing and soil deterioration; provides for the orderly use, improvement and development of such lands; and provides for the stabilization of the livestock industry dependent upon the public range; and

"WHEREAS, in furtherance of its purposes, said act provides for the creation of grazing districts to include an aggregate area of not more than eighty million acres of vacant, unreserved and unappropriated lands from any part of the public domain of the United States; provides for the exchange of State owned and privately owned lands for unreserved, surveyed public lands of the United States; provides for the sale of isolated or disconnected tracts of the public domain; and provides for the leasing for grazing purposes of isolated or disconnected tracts of vacant, unreserved and unappropriated lands of the public domain; and

"WHEREAS, said act provides that the President of the United States may order that unappropriated public lands be placed under national forest administration, if, in his opinion, the land be best adapted thereto; and

"WHEREAS, said act provides for the use of public land for the conservation or propagation of wild life; and

"WHEREAS, I find and declare that it is necessary to classify all of the vacant, unreserved and unappropriated lands of the public domain within certain States for the purpose of effective administration of the provisions of said act;

"NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of June 25, 1910 (ch. 421, 36 Stat. 847), as amended by the act of August 24, 1912 (ch. 369, 37 Stat. 497), and subject to the conditions therein expressed, it is ordered that all of the vacant, unreserved, and unappropriated public land in the States of Arizona,

ing a determination of the best use of the land. The withdrawal affected the land covered by the Taylor Grazing Act as well as land not covered by the statute. The President's authority to issue Executive Order No. 6910 was expressly conferred by the Pickett Act.[20]

California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, and for conservation and development of natural resources.

"The withdrawal hereby effected is subject to existing valid rights.

"This order shall continue in full force and effect unless and until revoked by the President or by act of Congress."

[20] In that Act, passed in 1910, Congress gave the President the authority to withdraw any public lands from "settlement, location, sale or entry": "[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Ch. 421, 36 Stat. 847.

Although the description of the withdrawal power does not specifically mention state indemnity selections, the power as described is so broad and general that it seems clear that had such an exception been intended, Congress would have made it express.

In *Wyoming* v. *United States*, 255 U. S. 489, this Court plainly indicated that an executive withdrawal of federal land under the Pickett Act would defeat a later attempt to select any part of such land as indemnity for lost school sections. The holding in the case was that an indemnity selection's validity should be tested as of the time made, and that a subsequent Pickett Act withdrawal could not defeat an earlier selection by the State that was otherwise valid. If a Pickett Act withdrawal could not preclude a school land indemnity selection, there would have been no need for the Court to reach the timeliness issue.

The Pickett Act was repealed by the Federal Land Policy and Management Act of 1976, § 704 (a), 90 Stat. 2792, but all previous withdrawals

Congress responded to Executive Order No. 6910 by amending the Taylor Grazing Act in 1936 in two respects that are relevant to this case. First, it expanded the acreage subject to the Act, see n. 18, *supra*. Second, it revised § 7 of the Act, see n. 17, *supra*, to give the Secretary the authority, in his discretion, to classify both lands within grazing districts and lands withdrawn by the recent Executive Order as proper not only for homesteading, but also, for the first time, for satisfaction of any outstanding "lieu" rights, and to open such lands to "selection." The section, thus amended, provided in pertinent part: [21]

"The Secretary of the Interior is authorized, in his dis-

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under the Pickett Act were expressly preserved unless and until modified. § 701 (c), 90 Stat. 2786.

In January 1936, President Roosevelt issued Executive Order No. 7274, which excluded from the operation of Executive Order No. 6910 lands which were then or which were thereafter placed within federal grazing districts. Once land was placed within a grazing district, the purpose of Order No. 6910 was, of course, satisfied.

[21] Section 7 of the Act, 48 Stat. 1272, as amended by the Act of June 26, 1936, § 2, 49 Stat. 1976, as set forth in 43 U. S. C. § 315f, reads in its entirety as follows:

"The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: *Provided*, That locations and entries under the mining laws including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification

> cretion, to examine and classify any lands withdrawn or reserved by Executive order . . . or within a grazing district, which are . . . proper for acquisition in satisfaction of any outstanding lieu, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws. . . . *Such lands shall not be subject to disposition . . . until after the same have been classified. . . .*" (Emphasis added.)

The changes in this section were apparently prompted in part by the fact that while the Taylor Grazing Act withdrawal preserved the States' school grants in place, no provision had been made in the 1934 version for the States' indemnity selections from land within grazing districts even though the States had expressed the concern that "the establishment of a grazing district would restrict the State in its indemnity selections." [22] While this omission may not have been critical in 1934 when the Act was passed—since only about half of the unappropriated federal land was then affected—by 1936, as a consequence of Executive Order No. 6910, no land at all was available in the public domain for indemnity selections. It is therefore reasonable to infer that the amendments to § 7 were at least in part a response to the

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and without restrictions or limitation by any provision of this subchapter. Where such lands are located within grazing districts reasonable notice shall be given by the Secretary of the Interior to any grazing permittee of such lands. The applicant, after his entry, selection, or location is allowed, shall be entitled to the possession and use of such lands: *Provided*, That upon the application of any applicant qualified to make entry, selection, or location, under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preference right to enter, select, or locate such lands if opened to entry as herein provided."

[22] Letter of Fred W. Johnson, Commissioner of the General Land Office, Department of the Interior, reprinted in H. R. Rep. No. 903, 73d Cong., 2d Sess., 9 (1934).

complaint expressed in congressional hearings in 1935, that there was no land available under current law for indemnity selections.[23]

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[23] See statement of John H. Page of Phoenix, Ariz.:

"[T]oo much thought in all of the hearings on the act was given to the grazing features, and very little attention was given to the mechanics and as to how it would affect all of the public-land laws that we have been functioning under. The result is that we are now tied up in just one general withdrawal of all public lands, and everything in the public-land structure and in all of the public-land laws and the contractual relations between the Government—and I refer to existing exchange acts and everything—they have all ceased to function.

"There is no land that can be acquired, there is no land that can be filed on for any purpose.

"I think all of you Senators will agree with me that there are other uses of the remaining public lands besides grazing. I term it generally to distinguish it from grazing, the use for industrial purposes; in other words, in Arizona a great many of our town sites or smelter sites and the like; those which have everything to do with industry, the title usually has been acquired by exchange selection, scrip, State selections. . . .

. . . . .

"When this bill was before Congress, I wrote our Senators and a great many of us did from Arizona, that we were all in sympathy with the grazing use, but that our fear was that they would get a little too enthusiastic about it and withdraw everything. In other words, I forecasted what has resulted, and I think in some measure that I was responsible for the 80,000,000-acre limitation that was put in. You remember that, Senator Hayden.

"That was just so that they would have to take the land that was suitable and not include everything. But then there was immediately, when it commenced to be administered, a general withdrawal of all remaining public lands." Hearing on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess., 3 (1935).

That it was understood that no land was available for the States' school land indemnity selections was confirmed by Senator Hayden at the same hearings. In response to Mr. Page's observation that there was no land open to entry in Arizona for exercise of railroad-grant exchange rights, the Senator observed: "The same thing would be true of a grant made to a State for university purposes or an indemnity selection." *Id.*, at 15.

Further, it was the clear position of the Interior Department in 1935

The 1936 amendment to § 7 rectified that problem, but did not give the States a completely free choice in making indemnity selections.[24] Rather, Congress decided to route the States' selections through § 7, and thereby to condition their acceptance on the Secretary's discretion. That decision was consistent with the dominant purpose of both the Act and Executive Order No. 6910 to exert firm control over the Nation's land resources through the Department of the Interior. In sum, the Taylor Grazing Act, coupled with the withdrawals by Executive Order, "locked up" all of the federal lands in the Western States pending further action by Congress or the President, except as otherwise permitted in the discretion of the Secretary of the Interior for the limited purposes specified in § 7.

This was Congress' understanding of the Taylor Grazing Act in 1958 when it amended the school land indemnity selection statute to permit selection of mineral lands. Both the House and Senate Reports specifically noted and adopted the Department of the Interior's assumption " 'that nothing in this bill is intended to affect the rights or duties of States under other laws' and, in particular, 'that no change is intended to be made in section 7 of the Taylor Grazing Act,

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that all of the land withdrawn under President Roosevelt's Executive Order No. 6910 was unavailable for school land indemnity selections. See *State of Arizona*, 55 I. D. 249, 253 (1935): "The law provides that indemnity lands may be taken for the school sections lost, but through the withdrawal of all public lands, there is no indemnity land to be obtained."

[24] Utah argues (see also dissenting opinion, *post*, at 530, n. 14) that the word "grant" in § 1 of the Taylor Grazing Act in the phrase, "[n]othing in this Act shall be construed in any way . . . to affect any land . . . which . . . [is] part of any grant to any State," includes not only grants in place but also the right to indemnity selections. If Utah's construction of the language were correct, there would have been no need to amend § 7 to authorize indemnity selections. Moreover, even if indemnity selections were contemplated by that phrase in § 1, the 1936 amendment to § 7 still requires that the lands selected first be reclassified by the Secretary in his discretion.

as amended (43 U. S. C., sec. 315f).' " H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2 (1958).[25] Since Congress was specifically dealing with school indemnity selections, the Reports make it perfectly clear that Congress deemed school indemnity selections to be subject to § 7 of the Taylor Grazing Act. And since the congressional decision in 1958 to allow school land indemnity selections to embrace mineral lands was expressly conditioned on a determination that the lost school lands were also mineral in character, it is manifest that Congress did not intend to grant the States any windfall. It only intended to restore to the States a rough approximation of what was lost. See n. 14, *supra*.

We therefore hold that the 1936 amendment to the Taylor Grazing Act conferred on the Secretary the authority in his discretion to classify lands within a federal grazing district as proper for school indemnity selection. And we find no merit in the argument that the Secretary's "grossly disparate value" policy constitutes an abuse of the broad discretion thus conferred. On the contrary, that policy is wholly faithful to Congress' consistent purpose in providing for indemnity selections, to give the States a rough equivalent of the school land grants in place that were lost through pre-emption or private entry prior to survey. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Since the early days of the Republic, the Federal Government's compact with each new State has granted the State land for the support of education and allowed the State to

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[25] S. Rep. No. 1735, 85th Cong., 2d Sess., 2 (1958): "Reports of the Secretary of the Interior on S. 2517 and H. R. 12117 [which contained the language just quoted from the House Report] are incorporated as a part of this report."

select land of equal acreage as indemnity for deficiencies in the original grant. Today, the Court holds that the Taylor Grazing Act abrogated those compacts by approving selection requirements completely at odds with the equal acreage principle. Nothing in the Court's opinion persuades me that Congress meant so lightly to breach compacts that it has respected and enforced throughout our Nation's history. I therefore dissent.

The Court's decision rests on three fundamental misconceptions. First, the Court reasons from the accepted proposition that indemnity lands compensate the States for gaps in the original grants to the mistaken conclusion that the States have no right to lands of equal acreage. *Ante,* at 507–510. This argument ignores the clear meaning of statutes spanning about two centuries in which Congress specifically adopted an equal acreage principle as the standard for making compensation. Second, the Court believes that the establishment of grazing districts under the Taylor Grazing Act has the same effect as a withdrawal of lands under the Pickett Act. *Ante,* at 513–519. This belief manifests a serious misunderstanding of both the history of federal land management and the language of the Taylor Grazing Act. Third, the Court assumes—without discussion—that the Taylor Grazing Act gives the Secretary of the Interior discretion to reject indemnity selections under standards inconsistent with the criteria set out in the statutes authorizing the selections. Every federal court that has considered the Secretary's authority under the Taylor Grazing Act has rejected this assumption.

A correct understanding of this case requires careful examination of a labyrinth of compacts and statutes dating back to the early years of our national history. Part I of this opinion reviews the unbroken succession of laws that undercut the Court's construction of the school indemnity selection statutes. Part II explains the development of the Taylor Grazing Act and its relationship to the Executive Orders withdrawing land under the Pickett Act. Finally, through a detailed con-

sideration of the Taylor Grazing Act's critical provisions, Part III demonstrates that the Act will not permit the construction that the Court has given it.

I

When the first 13 States formed the Union, each State had sovereign authority over the lands within its borders. These lands provided a tax base for the support of education and other governmental functions. When settlers sought to carve the State of Ohio from the Northwest Territory in 1802, they encountered a different situation. Vast tracts within the boundaries of the proposed State belonged to the Federal Government. Thus, the new State's potential revenue base would be restricted severely unless the Federal Government waived its immunity from taxation.[1] In order to place Ohio on an equal footing with the original States, Congress enacted a compromise drawn from the Land Ordinance of 1785[2] and the Northwest Ordinance of 1787.[3] The compromise set a pattern followed in the admission of virtually every other State.[4] Specific details varied from State to State, but the

[1] Congress did not address this problem in 1796 when Tennessee was created from land that North Carolina had ceded to the Confederation. Consequently, Tennessee contested congressional control over all vacant land within the State. The controversy ended with a compromise that established a federal reservation exempt from state taxation. Act of Apr. 18, 1806, ch. 31, §§ 1, 2, 2 Stat. 381–382; see P. Gates, History of Public Land Law Development 287–288 (1968).

[2] The Land Ordinance of 1785 "reserved the lot No. 16, of every township, for the maintenance of public schools within the said township. . . ." 1 Laws of the United States 565 (1815).

[3] Article III of the Northwest Ordinance of 1787 declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52. Article IV provided that legislatures established in the region could not "tax . . . the property of the United States" or interfere with the Federal Government's disposal of the public lands. *Ibid.*

[4] The pattern established by the Ohio Enabling Acts, Act of Mar. 3, 1803, 2 Stat. 225; Act of Apr. 30, 1802, § 7, 2 Stat. 175, was followed in

basic plan persisted. As consideration for each new State's pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education. *E. g.*, Act of Apr. 30, 1802, § 7, 2 Stat. 175 (Ohio); Act of Jan. 29, 1861, § 3, 12 Stat. 127–128 (Kansas); Act of July 16, 1894, §§ 3, 6, 28 Stat. 108–109 (Utah); see *United States* v. *Morrison*, 240 U. S. 192, 201 (1916).[5]

These agreements were solemn bilateral compacts between each State and the Federal Government. See *ante*, at 507; *United States* v. *Morrison*, *supra*, at 201–202; *Cooper* v. *Roberts*, 18 How. 173, 177–179 (1856). For its part, the Government granted the State specific sections of land within each township laid out by federal survey. The granted sections were specified by number to ensure that the State would receive a random cross section of the public land. Title to the sections vested in the State upon approval of the survey. *United States* v. *Morrison*, *supra*, at 207, 212; *Beecher* v. *Wetherby*, 95 U. S. 517 (1877). Should these grants in place prove unavailable, the Federal Government promised to grant the State indemnity in other lands of equal acreage. In return, Congress required the State to memorialize its pledge not to tax federal lands "by ordinance irrevocable without the consent of the United States." *E. g.*, Act of July 16, 1894, § 3, 28 Stat. 108 (Utah). Congress also imposed upon the State a binding and perpetual obligation to use the granted lands for the support of public education. All revenue from the sale or lease of the school grants was impressed with a

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the Acts organizing every State except Maine, Texas, West Virginia, and Hawaii. See P. Gates, *supra* n. 1, at 285–339.

[5] Until shortly after Congress stopped selling public land on credit, Act of Apr. 24, 1820, § 2, 3 Stat. 566, State Enabling Acts also exempted land sold by Congress from state taxation for a period of five years after the sale. The Acts enabling the organization of Ohio and other States in the Northwest Territory contained only this proscription because the Northwest Ordinance of 1787 already banned state taxes on federal lands. See P. Gates, *supra* n. 1, at 288–296; n. 3, *supra*.

trust in favor of the public schools. No State could divert school lands to other public uses without compensating the trust for the full market value of the interest taken. *Lassen* v. *Arizona ex rel. Arizona Highway Dept.*, 385 U. S. 458 (1967); see *Alamo Land & Cattle Co.* v. *Arizona*, 424 U. S. 295 (1976).

A long line of statutes dating from the early 1800's evidences Congress' consistent respect for the federal obligation to replace unavailable school sections with indemnity lands of equal acreage. See *United States* v. *Morrison, supra*, at 201–202. In 1826, the first general indemnity selection statute appropriated additional tracts to compensate the States for lands lost when fractional townships were found not to contain the numbered section originally granted. The statute directed the Secretary of the Treasury to select "out of any unappropriated public land" within the township where the section had been lost the "quantity" of land to which the State was entitled. Act of May 20, 1826, ch. 83, 4 Stat. 179. When private claims against unsurveyed public lands increased as the Nation moved west, Congress also acted to indemnify States for school sections occupied by settlers. The earliest statutes authorized officials in particular States or Territories to select "other lands to an equal amount . . . in lieu of [the] sections so occupied. . . ." *E. g.*, Act of Mar. 2, 1853, § 20, 10 Stat. 179 (Washington Territory).[6]

In 1859, a second statute of general applicability appropriated "other lands of like quantity" to replace school sections pre-empted by prior settlement, "fractional in quantity," missing from a township, or lost "from any natural cause whatever." Act of Feb. 26, 1859, ch. 58, 11 Stat. 385. Although the statute incorporated by reference the selection provisions of the 1826 Act, a more particular statute passed on the same day expressly empowered local officials in one western

[6] See Act of Mar. 3, 1853, § 7, 10 Stat. 247 (California); Act of Jan. 7, 1853, ch. 6, 10 Stat. 150 (Oregon).

county to make their own indemnity selection. Upon filing with the local federal register, the statute declared, "the land so selected shall . . . belong to the school fund . . . in all respects the same as other school lands. . . ." Act of Feb. 26, 1859, ch. 59, 11 Stat. 385 (Sarpy County, Neb.).

The general statutes of 1826 and 1859, consolidated and codified as §§ 2275 and 2276 in the Revised Statutes of 1874, underwent extensive revision in 1891. The resulting law appropriated additional land to replace school sections lost because they were mineral in character, included within a federal reservation, or "otherwise disposed of by the United States." In lieu of unavailable school sections, each State was entitled to such "other lands of equal acreage . . . [as] may be selected by said State. . . ." Act of Feb. 28, 1891, ch. 384, 26 Stat. 796. The States could make their indemnity selections from "any unappropriated, surveyed public lands, not mineral in character, within the State. . . ." *Id.*, at 797.

The 1891 revision had at least four effects. First, it reaffirmed the States' unquestioned right to replace lost school sections with lands of equal acreage. Second, it removed the restriction that had limited indemnity selections to land within the township where the school section was unavailable. Third, it appeared to confirm this Court's earlier decision that school grants did not convey mineral lands to the States.[7] Fourth, it expressly conformed the general indemnity selection statutes to the mid-19th-century enactments that gave certain States the right to make their own indemnity selections. Even where the earlier statutes gave a State the power of selection, however, it had become accepted practice for the State to submit its selections for the approval of the Secretary of the Interior.[8] State Enabling Acts passed in 1889

[7] *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167 (1880); see *United States* v. *Sweet*, 245 U. S. 563, 570–572 (1918).

[8] See *Todd* v. *Washington*, 24 L. D. 106 (1897). The Secretary of the Interior assumed the Secretary of the Treasury's responsibility for the public lands in 1849. Act of Mar. 3, 1849, § 3, 9 Stat. 395.

and 1890 sanctioned the practice explicitly.[9] The 1891 revision of the general indemnity selection laws did not mention the need for federal approval, but the inclusion of an approval requirement in the Utah Enabling Act passed three years later suggests that the revision authorized no departure from the accepted practice. See Act of July 16, 1894, § 6, 28 Stat. 109.

By the end of the 19th century, the States' right to select land of equal acreage in lieu of lost school sections had been established for nearly 100 years. The only unsettled question was whether the Secretary of the Interior had discretion to disapprove the selections. In *Payne* v. *New Mexico*, 255 U. S. 367 (1921), this Court resolved that question in the States' favor. New Mexico had selected alternative land in exchange for school sections lying within a national forest. Before the Secretary approved the selection, the grants in place were restored to the public domain. The Secretary found that the restoration of the grants in place defeated the basis for the exchange selection. The Court held, however, that equitable title to properly selected land vested in the State when the selection was filed. If the selection satisfied the requirement of the general school grant statutes, the Secretary had no power to annul the State's title. *Id.*, at 370–371.

Three weeks later, the Court made the same point even more emphatically in *Wyoming* v. *United States*, 255 U. S. 489 (1921). In that case, the land selected by Wyoming in exchange for a school section lying within a national forest later was withdrawn by the Federal Government "as possible oil land." *Id.*, at 495. The Court again concluded that equitable title to the chosen land vested in the State on the date the selection was filed. It was not, the Court said,

"as if the selection was merely a proposal by the State

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[9] See Act of July 10, 1890, § 4, 26 Stat. 223 (Wyoming); Act of July 3, 1890, § 4, 26 Stat. 215 (Idaho); Act of Feb. 22, 1889, § 10, 25 Stat. 679 (North Dakota, South Dakota, Montana, Washington).

> which the [federal] land officers could accept or reject. They had no such option to exercise. . . . The power confided to them was not that of granting or denying a privilege to the State, but of determining whether an existing privilege conferred by Congress had been lawfully exercised. . . ." *Id.*, at 496.

In the years after *Payne* and *Wyoming*, Congress further expanded the States' rights to land for the support of public education. A 1927 statute declared that school grants were "to embrace numbered school sections mineral in character. . . ." Act of Jan. 25, 1927, § 1, 44 Stat., pt. 2, p. 1026. A 1958 amendment to the indemnity selection statutes, by then found in their present places as 43 U. S. C. §§ 851, 852, permitted States to select mineral lands as indemnity for lost school sections that were mineral in character. Act of Aug. 27, 1958, 72 Stat. 928. This provision reflected a congressional judgment that the ban on mineral land indemnity for lost mineral lands had denied the States the fair cross section of land values contemplated by the orginal numbered grants.[10] Congress also found that a rule which kept the States from replacing nonmineral land with mineral land "amply protected" the federal interest in preventing a windfall to the States. Congress therefore declined to depart from the fundamental equal acreage principle accepted since 1802. H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2, 3–4 (1958). Indeed, Congress always has adhered to the equal acreage principle as its standard for just indemnification. As recently as 1966, when it amended 43 U. S. C. § 852 to allow indemnity selections from unsurveyed as well as surveyed public land, Congress rejected the Secretary of the Interior's proposal to import an "equal value concept" into the indemnity statutes.

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[10] See 104 Cong. Rec. 11921 (1958) (remarks of Sen. Watkins of Utah, cosponsor of the bill).

See Act of June 24, 1966, Pub. L. 89–470, 80 Stat. 220; S. Rep. No. 1213, 89th Cong., 2d Sess., 2, 4–5 (1966).[11]

II

The Utah Enabling Act of 1894 grants to the State four numbered sections within each township for the support of public education. If those sections "have been sold or otherwise disposed of" by the Federal Government, the Act—like other statutes of its kind—directs school grant indemnity lands "to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior. . . ." Act of July 16, 1894, § 6, 28 Stat. 109. In accordance with this direction, Utah has selected 194 tracts of mineral land as indemnity for lost school sections said to be mineral in character. Utah alleges that the tracts selected are unappropriated public land equal in acreage to the unavailable sections. Thus, the tracts appear to satisfy the basic indemnity selection requirements of 43 U. S. C. §§ 851, 852.

The Secretary, however, has refused to determine whether the selections satisfy the indemnity statutes. Instead, he claims that the Taylor Grazing Act of 1934, as amended, 43 U. S. C. § 315 *et seq.*, gives him discretion to disapprove the selection of indemnity lands "where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity." App. 61. The Court today agrees. In an unprecedented departure, the Court concludes that Congress intended the Taylor Grazing Act to abrogate the equal acreage principle that Congress has reaffirmed repeatedly since 1802. The conclusion is implausible on its face, and the Taylor Grazing Act belies it. A full review of the Act's history and structure shows that this land management legisla-

[11] The Court points to nothing in nearly two centuries of American history to support its statement that the Secretary's comparative value concept is "wholly faithful to Congress' consistent purpose in providing for indemnity selections, to give the States a rough equivalent of the school grants in place that were lost. . . ." *Ante*, at 520.

tion affects only the States' right to make land exchanges. Indeed, the language of the Act—analyzed more closely in Part III of this opinion—expressly protects the States' indemnity selection rights from any impairment whatever.

The Taylor Grazing Act was intended to protect the public lands from spoliation while providing for the orderly satisfaction of valid claims against them. By the mid-1930's, the public ranges in the Western States were seriously endangered. Overgrazing had destroyed the better grasses, erosion had bared the steep hillsides, and silt had filled the waterholes. Homesteading on the better watered grounds aggravated the situation by leaving other lands without access to water. Finally, the disastrous decline of livestock prices during the Great Depression drove stockmen to make even greater use of free grazing on the already depleted public domain.[12] It was against this background that Congress in 1934 enacted the Taylor Grazing Act "to promote the highest use of the public lands pending its final disposal. . . ." § 1, 48 Stat. 1269.

Section 1 of the Act authorized the Secretary of the Interior "in his discretion, . . . to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain . . . , which in his opinion are chiefly valuable for grazing and raising forage crops. . . ." *Ibid.*[13] Land noticed for inclusion within a grazing district was withdrawn from "all forms of entry [or] settlement" until hearings could be conducted. *Id.*, at 1270. Congress carefully provided, however, that the Act was not to impede orderly disposition of the public lands. When some States objected

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[12] See generally P. Gates, *supra* n. 1, at 519–529, 607–613.

[13] The Taylor Grazing Act further provided that the land included within grazing districts could not aggregate more than 80 million acres. § 1, 48 Stat. 1269. The acreage limitation rose to 142 million acres in 1936, Act of June 26, 1936, Title I, § 1, 49 Stat. 1976, and it disappeared entirely in 1954, Act of May 28, 1954, § 2, 68 Stat. 151.

to an earlier draft of the Act "upon the theory that the establishment of a grazing district would restrict [a] State in its indemnity selections," Congress recast § 1 to declare expressly that

> "[n]othing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands . . . except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State. . . ." *Id.*, at 1269.[14]

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[14] The last part of the provision was added to the statute by the House Committee on the Public Lands. See Hearings on H. R. 2835 and H. R. 6462 before the House Committee on the Public Lands, 73d Cong., 1st Sess. and 2d Sess., 195 (1934). At the time the language was inserted, the Committee had before it a report from the Secretary of the Interior indicating that some States had objected to the bill "upon the theory that the establishment of a grazing district would restrict the State in its indemnity selections." *Id.*, at 5 (memorandum from General Land Office Commissioner Johnson to Secretary Ickes); see H. R. Rep. No. 903, 73d Cong., 2d Sess., 9 (1934); S. Rep. No. 1182, 73d Cong., 2d Sess., 7 (1934). The Senate further expanded the exemption. See 78 Cong. Rec. 11147 (1934); Hearings on H. R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong., 2d Sess., 64 (1934). The House conferees acceded to the Senate amendment, after inserting the phrase "validly affecting the public lands" behind the words "existing law." See H. R. Conf. Rep. No. 2050, 73d Cong., 2d Sess., 1, 4 (1934).

The Court simply ignores this highly relevant sequence of events. It even cites the Secretary's report on the States' concern for the plainly erroneous proposition that the original Act made "no provision . . . for the States' indemnity selections from land within grazing districts. . . ." *Ante*, at 517. Perhaps the Court's confusion arises from its assumption that the broad saving provision covers only lands specifically granted, rather than all lands needed for satisfaction of a grant. *Ante*, at 519, n. 24. This assumption is logically untenable. Lands selected in lieu of deficiencies in a grant cannot be conveyed to the grantee unless they become "part of [the] grant." 48 Stat. 1269.

Section 7 also gave the Secretary discretion to reclassify land within a grazing district as "more valuable and suitable for the production of agricultural crops than native grasses and forage plants. . . ." *Id.*, at 1272. Upon reclassification, such land again became "subject to settlement or occupation as homesteads. . . ." *Ibid.*

The Act contained critically important provisions for land exchanges. Section 8 authorized the Secretary to accept private and state land within a grazing district in exchange for any surveyed public land of no more than "equal value." *Id.*, at 1272–1273. The section showed special solicitude for the States by directing the Secretary to proceed with state-initiated exchanges "at the earliest practicable date, and to cooperate fully with the State to that end. . . ." *Id.*, at 1273. The Western States, however, objected to the discretionary exchange provisions. The Governor of Wyoming, for example, opposed the Act because he feared that § 8 would impair the State's right to exchange school sections isolated inside a federal reservation or a grazing district for other, better situated acreage. In testimony before the Senate Committee, he argued that the Secretary might not allow enough exchanges to permit the removal of state land from inside federally administered areas. The Governor therefore urged that the Act's exchange provisions should be mandatory.[15] Testimony given by the Executive Secretary of the Utah Land Board expressed the same concerns.[16] The State Land Commissioner of Arizona also suggested that the Act would prevent private citizens from exercising their legitimate rights

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[15] Hearings on H. R. 6462 before the Senate Committee on Public Lands and Surveys, 73d Cong., 2d Sess., 195–209 (1934) (testimony of Gov. Miller of Wyo.).

[16] *Id.*, at 209–216 (testimony of George Fisher). Not until Congress amended the Taylor Grazing Act in 1936 was the Secretary of the Interior required to effect exchanges of state-owned lands. See *infra*, at 534.

against lands included in a grazing district.[17] Although the Secretary argues that these witnesses opposed the Act because it impaired the States' right to make indemnity selections, nothing in their testimony supports that conclusion. Indeed, the testimony of all three witnesses is most remarkable for its failure to suggest that they thought the Taylor Grazing Act would interfere with school grant indemnity selections by the Western States.

Five months after the Act went into effect, President Roosevelt issued Executive Order No. 6910 (1934). Invoking his authority under the Pickett Act of 1910,[18] the President withdrew all unreserved and unappropriated public lands in 12 Western States "from settlement, location, sale or entry . . . pending determination of the most useful purpose to which such land may be put. . . ." The effect of this Pickett Act withdrawal was far-reaching. Although homesteading and other activities continued under existing claims, new entries upon the public domain came to a halt. See 55 I. D. 205 (1935). The withdrawal also forestalled States and private citizens from exercising their exchange, scrip, or indemnity rights to appropriate public land. See *State of Arizona*, 55 I. D. 249, 253–254 (1935).[19]

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[17] Hearings on H. R. 6462, *supra*, at 161–174 (testimony of Howland J. Smith).

[18] The Pickett Act of 1910, ch. 421, 36 Stat. 847, authorized the President temporarily to "withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . , and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes. . . ." The Act was repealed by the Federal Land Policy and Management Act of 1976, § 704 (a), 90 Stat. 2792.

[19] This Court later held that a Pickett Act withdrawal is a "previous disposition" of land by the Federal Government that prevents title to numbered school sections from vesting in the States upon completion of a survey. *United States* v. *Wyoming*, 331 U. S. 440, 443–444, 454 (1947). Executive Order No. 7599, 2 Fed. Reg. 633 (1937), however, expressly exempted numbered school sections from the operation of Executive Order No. 6910.

Only months after the Order issued, the Senators from Arizona began hearings on a proposal to undercut the withdrawal by broadening the Secretary's powers under §§ 7 and 8 of the Taylor Grazing Act.[20] The bill suffered a pocket veto, but an almost identical bill became law in 1936. Act of June 26, 1936, Title I, 49 Stat. 1976. In the meantime, Executive Order No. 7274 (1936) excluded from the operation of the earlier Order "all lands which are now, or may hereafter be, included within grazing districts. . . ." Thus, by the time the bill was enacted, the Pickett Act withdrawal had no further effect on lands administered under the Taylor Grazing Act.[21]

The 1936 enactment significantly amended §§ 7 and 8 of the Taylor Grazing Act. The amendment to § 7 authorized the Secretary of the Interior to classify lands withdrawn by Executive Order No. 6910 or "within a grazing district" as "more valuable or suitable" for uses other than grazing or as "proper for acquisition in satisfaction of any outstanding lieu, exchange or script [*sic*] rights or land grant. . . ." 49 Stat. 1976.[22] Such land would be open "to entry, selection, or

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[20] See Hearings on S. 2539 before the Senate Committee on Public Lands and Surveys, 74th Cong., 1st Sess., 1–2 (1935). See also S. Rep. No. 1005, 74th Cong., 1st Sess., 2 (1935).

Five days after the hearings began, the President limited his earlier withdrawal by amending Executive Order No. 6910 to authorize exchanges of land under § 8 of the Taylor Grazing Act. Exec. Order No. 7048 (1935). Participants in the congressional hearings accurately observed, however, that Executive Order No. 6910 had left no land available for school grant indemnity selection. See *ante*, at 518–519, n. 23; *supra*, at 532.

[21] The Court scarcely mentions Executive Order No. 7274. It therefore fails to recognize that the land within a grazing district is "locked up" only to the extent that the Taylor Grazing Act affirmatively precludes otherwise legitimate claims against it. See *ante*, at 519. Any implication that the Pickett Act continues to affect lands within a grazing district is simply mistaken. See *ante*, at 515–516, n. 20; n. 24, *infra*.

[22] The Senate Report on this amendment says that it was intended "to provide a more practicable and satisfactory method of classification of

location" under the applicable public land laws. The statute directed the Secretary to respond to an application for entry by classifying the subject land, but no lands were to be appropriated "until after the same have been classified and opened to entry. . . ." *Ibid.*

The amendment to § 8 made mandatory the Taylor Grazing Act's provisions for the exchange of state-owned land.[23] Upon the receipt of any State's application for an exchange, the statute now provided, the Secretary "shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end. . . ." *Id.*, at 1977. Furthermore, the Secretary was authorized to make exceptions to the equal value requirement that remained applicable to exchanges of private land. The federal land exchanged for state land could be "either of equal value or of equal acreage." *Ibid.*

III

Two specific provisions of the Taylor Grazing Act are critical to the Court's resolution of this case. The Court first must demonstrate that § 1 of the Act, 43 U. S..C. § 315, does not exclude the State's school grant indemnity rights from the reach of the statute. The Court then must establish that § 7 of the Act, 43 U. S. C. § 315f, gives the Secretary of the Interior power to disapprove the selection of lands that satisfy

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lands within a grazing district and to make available for *private* entry lands which are more valuable for other purposes than grazing." S. Rep. No. 2371, 74th Cong., 2d Sess., 2 (1936) (emphasis added). The legislative history provides no support for the Court's inference that the amendment was a response to complaints about the effect of the Taylor Grazing Act—as distinguished from Executive Order No. 6910—upon *state* indemnity selections. See *ante*, at 517–518, 519, n. 24.

[23] See S. Rep. No. 2371, 74th Cong., 2d Sess., 2 (1936). Mandatory exchanges were critically important to the Western States. See *supra*, at 531–532.

all requirements of the school grant indemnity statutes, 43 U. S. C. §§ 851, 852. The Court fails to clear either hurdle because neither section of the Act permits the construction that the Court would give it. The plain language of § 1 protects school grant indemnity rights from the operation of the statute. And even if the Act applied to school grants, § 7 would not give the Secretary discretion to reject otherwise proper indemnity selections.

A

Section 1 of the Taylor Grazing Act provides that nothing in the statute shall "affect any land . . . which [otherwise] would be a part of any grant to any State. . . ." The exemption is transparently clear. All grants made by the compacts between the States and the Federal Government are completely unaffected by the Taylor Grazing Act. Thus, the establishment of a grazing district is not a federal "reservation" or "disposition" of land that can prevent title to numbered school sections from vesting in the States. See 43 U. S. C. § 851. Furthermore, designated grazing land remains "unappropriated" and available for the satisfaction of school grants under the terms of the indemnity statutes. See 43 U. S. C. §§ 852 (a) and (d). The purpose of the Act is simply to provide that unsurveyed or unselected school land, like other public land, can be included in grazing districts "[i]n order to promote [its] highest use . . . pending its final disposal." 43 U. S. C. § 315.

The Court gives the unqualified exemption in § 1 a construction that is inconsistent with its plain language and the stated purpose of the Act. The Court concedes that the inclusion of numbered school sections within a grazing district is not a federal disposition of the land that can defeat the grants in place. *Ante*, at 513.[24] It holds, however, that the

[24] Given the Court's concession on this point, its reliance on *United States* v. *Wyoming*, 331 U. S. 440 (1947), is misplaced. *Ante*, at 515, n. 20;

inclusion of other lands within a grazing district is a federal appropriation that can defeat a State's otherwise clear right to replace lost school sections with lands of equal acreage. *Ante*, at 519. Thus, the Court thinks the Taylor Grazing Act does "affect . . . land . . . which [otherwise] would be . . . part of" a grant to a State. Indeed, the Court concludes that the Act gives the Secretary of the Interior power to nullify an earlier congressional "disposal" of public land. This construction is wholly at odds with the express language and the clear history of the Act.

B

Even if I could agree with the Court that § 1 of the Taylor Grazing Act exempts only numbered school sections from the operation of the Act, I could not agree with the Court's unexplained conclusion that § 7 allows the Secretary of the Interior to review school grant indemnity selections under a comparative value standard. Section 7 of the Act, 43 U. S. C. § 315f, gives the Secretary discretion to reclassify designated grazing lands as

> "[i] more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or [ii] more valuable or suitable for any other use than for [grazing], or [iii] proper

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see *supra*, at 533, and n. 21. In that case, the United States sought to quiet title to oil land lying within one of the State's numbered school sections. The land had been withdrawn under the Pickett Act of 1910, ch. 421, 36 Stat. 847, several months before a survey identified it as a school section. The Court held that the Pickett Act withdrawal was a "previous disposition" by the Federal Government that prevented title to the school section from vesting in the State upon completion of the survey. 331 U. S., at 433–444, 454. Since the Taylor Grazing Act—unlike the Pickett Act—does not "dispose" of otherwise unreserved public lands, *United States* v. *Wyoming* provides no support for the notion that the Act withdrew grazing lands from indemnity selection under the provisions of the State Enabling Acts and the school indemnity statutes.

> for acquisition in satisfaction of any outstanding lieu, exchange or script [*sic*] rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws. . . ."

The Courts of Appeals have concluded that this section gives the Secretary substantial discretion to conserve the public lands. Thus, the Secretary may reject private applications for land that he finds suitable for more efficient uses. See *Bleamaster* v. *Morton*, 448 F. 2d 1289 (CA9 1971); *Carl* v. *Udall*, 114 U. S. App. D. C. 33, 37–38, 309 F. 2d 653, 657–658 (1962). The courts also have upheld administrative determinations that certain land is not proper for private acquisition because the relevant land grant did not convey lands of that character. See *Pallin* v. *United States*, 496 F. 2d 27, 34–35 (CA9 1974); *Finch* v. *United States*, 387 F. 2d 13, 15–16 (CA10 1967), cert. denied, 390 U. S. 1012 (1968). But these federal courts agree that § 7 of the Taylor Grazing Act does not give the Secretary authority to review a land selection under standards fundamentally inconsistent with the terms of the relevant land grant statutes. See *Pallin* v. *United States, supra; Bronken* v. *Morton*, 473 F. 2d 790, 795–796 (CA9), cert. denied, 414 U. S. 828 (1973); *Finch* v. *United States, supra*. The word "proper" in the third clause of § 7 quoted above cannot mean proper under whatever criteria the Secretary sees fit to devise.

Nothing in this general provision, concerned with the satisfaction of private as well as state claims, suggests that Congress intended to authorize a comparative value standard at odds with the equal acreage principle found in every school grant indemnity statute since the beginning of the 19th century. When a specific statute grants fixed acreages, the Secretary cannot defeat the grant by applying a comparative value test based on the general provisions of § 7. *Bronken* v. *Morton, supra*. This rule should apply with special force where the

Federal Government has granted fixed quantities of land to a State as part of the bilateral compact under which the State was admitted to the Union. Even the exchange provisions in § 8 of the Taylor Grazing Act acknowledged the equal acreage principle. The section allowed the Secretary to accept private lands only in return for public lands of no more than "equal value," 43 U. S. C. § 315g (b) (1970 ed.), but it authorized him to take state-owned lands in exchange for "land either of equal value or of equal acreage," § 315g (c). Having expressly acknowledged the equal acreage principle in a section dealing with the exchange of lands to which the States already hold title, the Act could not silently have authorized departures from that principle in a section dealing with indemnity for deficiencies in the original land grants.

The Congress that passed the indemnity provision under which Utah has made its selections found that a law permitting the selection of mineral lands as indemnity for other mineral lands of equal acreage "amply protected" the federal interest. H. R. Rep. No. 2347, 85th Cong., 2d Sess., 2 (1958). The sponsors of the legislation and the Department of the Interior did not conclude—as the Court does—that such selections would allow the States to secure an unfair advantage. Instead, they agreed that the selection of mineral lands on an equal acreage basis was necessary to guarantee the public schools a "fair cross section of land values." *Id.*, at 4 (report of the Department of the Interior); 104 Cong. Rec. 11921 (1958) (remarks of Sen. Watkins); see *supra*, at 527. No later Congress has receded from this view, despite the Secretary's invitation to do so. See S. Rep. No. 1213, 89th Cong., 2d Sess., 2, 4 (1966); *supra*, at 527–528. For nearly 180 years, Congress has adhered to the equal acreage principle embodied in the specific statutes most relevant to this case. The Court has no basis for surmising that a general statute addressed to different issues has given the Secretary authority to adopt an inconsistent position.

IV

Utah has selected land in satisfaction of grants made to support the public education of its citizens. Those grants are part of the bilateral compact under which Utah was admitted to the Union. They guarantee the State a specific quantity of the public lands within its borders. *Payne* v. *New Mexico*, 255 U. S. 367 (1921), and *Wyoming* v. *United States*, 255 U. S. 489 (1921), require the Secretary of the Interior to approve Utah's indemnity selections if they designate tracts equal in acreage to the lands replaced and otherwise satisfy the requirements of 43 U. S. C. §§ 851, 852. Nothing in the Taylor Grazing Act empowers the Secretary to review Utah's selections under a comparative value standard explicitly at odds with principles consistently respected since the early days of our Republic.

For a decade or longer, however, the Secretary has refused to determine whether Utah's selections satisfy §§ 851 and 852. Indeed, he has refused to make any determination at all. Rather, the Secretary has claimed that the Taylor Grazing Act gives him discretion to disapprove the selection of indemnity lands more valuable than Utah's lost school sections. In the five years since Utah took issue with that claim, the registry of the District Court has swollen with the proceeds of oil shale leases on the selected land—proceeds which the Federal Government now claims on the ground that the Secretary has not approved the indemnity selections. The District Court brought this matter to a just conclusion. It ordered the Secretary to do his duty. The Court of Appeals affirmed, and I would affirm its judgment.

TEXAS *v.* NEW MEXICO

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 65, Orig. Argued March 24, 1980—Decided May 19, 1980

Exceptions to Special Master's report overruled.

Douglas G. Caroom, Assistant Attorney General of Texas, argued the cause for plaintiff. With him on the briefs were *Mark White,* Attorney General, *John W. Fainter, Jr.,* First Assistant Attorney General, and *Ted L. Hartley,* Executive Assistant Attorney General.

Richard A. Simms, Special Assistant Attorney General of New Mexico, argued the cause for defendant. With him on the briefs were *Jeff Bingaman,* Attorney General, and *G. Emlen Hall, Charles M. Tansey,* and *Jay F. Stein,* Special Assistant Attorneys General.

Solicitor General McCree filed a memorandum for the United States as intervenor.

PER CURIAM.

Upon consideration of the report filed October 15, 1979, by Senior Judge Jean S. Breitenstein, Special Master, and the exceptions thereto, and on consideration of briefs and oral argument thereon,

IT IS ADJUDGED, ORDERED, AND DECREED that all exceptions are overruled, the report is in all respects confirmed, and the ruling of the Special Master on the "1947 condition" as that term appears in Arts. II (g) and III (a) of the Pecos River Compact is approved.

MR. JUSTICE STEVENS, dissenting.

Under the Pecos River Compact of 1949, ch. 184, 63 Stat. 159, the State of New Mexico has a duty "not [to] deplete by man's activities the flow of the Pecos River at the New

Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition."

Article VI (c) of the Compact provides that the "inflow-outflow" method is to be used to determine whether New Mexico is complying with this obligation.[1] Briefly stated, this method involves the development of a correlation between the inflow to a basin and the expected outflow so that, for any given inflow, engineers can estimate the amount of water that should flow through and should therefore be available for downstream (in this case Texas') use. In a river routing study made available to the Commissioners prior to the signing of the Compact, engineers attempted to develop such a correlation for the Pecos by calculating for each year from 1905 to 1946 what the outflow would have been at various points if the New Mexico water uses in place in 1947 had been in place in prior years as well. This study was then to be used as a baseline in comparing future inflow and outflow in order to determine whether New Mexico was using a larger share of the river water than it had in 1947, in violation of the Compact.

For years after the Compact was signed, there were disputes between the States over the proper application of the inflow-outflow method. Both sides recognized that the routing study contained some errors, and they attempted to correct those errors through negotiation. When negotiations ultimately failed, Texas brought this suit, alleging that New Mexico had breached its obligations under the Compact by using more water than it was entitled to use under the proper definition of the "1947 condition."

One of the main issues before the Special Master was the meaning of the term "1947 condition." The Master found

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[1] This method is to be used "unless and until a more feasible method is devised." See Art. VI (c). In this proceeding the States agree that the inflow-outflow method continues to apply.

that the term referred only to depletions due to the New Mexico water uses that were in place in 1947, along with certain projected uses.[2] He therefore held that the errors in the old routing study had to be corrected before that study could be used in determining compliance. In its objections to the Master's report, Texas takes the position that the "1947 condition" refers not to actual physical conditions on the river, but rather to the baseline values developed through the 1947 routing study. It therefore argues that, in the absence of agreement, the parties must continue to use that study, despite its errors, in determining compliance.

The objections filed on behalf of the State of Texas persuade me that the Master's definition is not the one the two States agreed upon when they entered into the Compact. Article II (g) provides that, as used in the Compact:

> "The term '1947 condition' means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report."

The routing study that Texas relies upon was a part of the Report of the Engineering Advisory Committee as that term is defined in the Compact.[3] It therefore, in my opinion, be-

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[2] The Master defined the term as follows:

"The 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 and from the augmented Fort Sumner and Carlsbad acreage."

[3] The routing study was Appendix A to the Report. Article II (f) provides:

"The term 'Report of the Engineering Advisory Committee' means that certain report of the Engineering Advisory Committee dated January 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held

came a part of the Compact definition of the 1947 condition to which the parties agreed. Although this concededly makes the term "1947 condition" an "artificial" definition, rather than a description of actual conditions, the fact that the parties agreed to base their decisions on all questions of fact on that Report indicates that the parties also agreed to use the routing study as a basic frame of reference. Moreover, had the parties merely intended to describe the New Mexico water uses that existed in 1947, I believe they would have used language similar to that employed by the Master and would not have included the detailed reference to the Report of the Engineering Advisory Committee in both Arts. II (g) and II (f). Finally, the fact that the parties later recognized some errors in that study and attempted to rectify them through negotiation does not, in my judgment, change the meaning of the Compact itself. Accordingly, I would sustain the objections of the State of Texas.

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in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting."

UNITED STATES *v.* MENDENHALL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-1821. Argued February 19, 1980—Decided May 27, 1980

Respondent, prior to trial in Federal District Court on a charge of possessing heroin with intent to distribute it, moved to suppress the introduction in evidence of the heroin on the ground that it had been acquired through an unconstitutional search and seizure by Drug Enforcement Administration (DEA) agents. At the hearing on the motion, it was established that when respondent arrived at the Detroit Metropolitan Airport on a flight from Los Angeles, two DEA agents, observing that her conduct appeared to be characteristic of persons unlawfully carrying narcotics, approached her as she was walking through the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket. After respondent produced her driver's license, which was in her name, and her ticket, which was issued in another name, the agents questioned her briefly as to the discrepancy and as to how long she had been in California. After returning the ticket and driver's license to her, one of the agents asked respondent if she would accompany him to the airport DEA office for further questions, and respondent did so. At the office the agent asked respondent if she would allow a search of her person and handbag and told her that she had the right to decline the search if she desired. She responded: "Go ahead," and handed her purse to the agent. A female police officer, who arrived to conduct the search of respondent's person, also asked respondent if she consented to the search, and respondent replied that she did. When the policewoman explained that respondent would have to remove her clothing, respondent stated that she had a plane to catch and was assured that if she was carrying no narcotics there would be no problem. Respondent began to disrobe without further comment and took from her undergarments two packages, one of which appeared to contain heroin, and handed them to the policewoman. Respondent was then arrested for possessing heroin. The District Court denied the motion to suppress, concluding that the agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop, based on facts justifying a suspicion of criminal activity, that respondent had accompanied the agents to the DEA office voluntarily, and that respondent voluntarily consented to the

search in the DEA office. Respondent was convicted after trial, but the Court of Appeals reversed, finding that respondent had not validly consented to the search.

Held: The judgment is reversed, and the case is remanded. Pp. 550–560; 560–566.

596 F. 2d 706, reversed and remanded.

MR. JUSTICE STEWART delivered the opinion of the Court with respect to parts I, II–B, II–C, and III, concluding:

1. Respondent's Fourth Amendment rights were not violated when she went with the agents from the concourse to the DEA office. Whether her consent to accompany the agents was in fact voluntary or was the product of duress or coercion is to be determined by the totality of all the circumstances. Under this test, the evidence—including evidence that respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers, and that there were neither threats nor any show of force—was plainly adequate to support the District Court's finding that respondent voluntarily consented to accompany the officers. The facts that the respondent was 22 years old, had not been graduated from high school, and was a Negro accosted by white officers, while not irrelevant, were not decisive. Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218. Pp. 557–558.

2. The evidence also clearly supported the District Court's view that respondent's consent to the search of her person at the DEA office was freely and voluntarily given. She was plainly capable of a knowing consent, and she was twice expressly told by the officers that she was free to withhold consent and only thereafter explicitly consented to the search. The trial court was entitled to view her statement, made when she was told that the search would require the removal of her clothing, that "she had a plane to catch," as simply an expression of concern that the search be conducted quickly, not as indicating resistance to the search. Pp. 558–559.

MR. JUSTICE STEWART, joined by MR. JUSTICE REHNQUIST, concluded in Part II–A, that no "seizure" of respondent, requiring objective justification, occurred when the agents approached her on the concourse and asked questions of her. A person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave, and as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification. Nothing in the record suggests that respondent had any objective reason to believe that

she was not free to end the conversation in the concourse and proceed on her way. Pp. 551–557.

MR. JUSTICE POWELL, joined by THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, concluded that the question whether the DEA agents "seized" respondent within the meaning of the Fourth Amendment should not be reached because neither of the courts below considered the question; and that, assuming that the stop did constitute a seizure, the federal agents, in light of all the circumstances, had reasonable suspicion that respondent was engaging in criminal activity and, therefore, did not violate the Fourth Amendment by stopping her for routine questioning. Pp. 560–566.

STEWART, J., announced the Court's judgment and delivered an opinion of the Court with respect to Parts I, II–B, II–C, and III, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and an opinion with respect to Part II–A, in which REHNQUIST, J., joined. POWELL, J., filed an opinion concurring in part and concurring in the judgment, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 560. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 566.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree* and *Assistant Attorney General Heymann.*

F. Randall Karfonta argued the cause and filed a brief for respondent.*

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE REHNQUIST joined.†

The respondent was brought to trial in the United States District Court for the Eastern District of Michigan on a

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**Fred E. Inbau, Wayne W. Schmidt, Frank G. Carrington, Jr.*, and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis, Jr.*, for the American Civil Liberties Union; and by *Terence F. MacCarthy* and *Carol A. Brook* for the National Legal Aid and Defender Association.

†THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL also join all but Part II–A of this opinion.

charge of possessing heroin with intent to distribute it. She moved to suppress the introduction at trial of the heroin as evidence against her on the ground that it had been acquired from her through an unconstitutional search and seizure by agents of the Drug Enforcement Administration (DEA). The District Court denied the respondent's motion, and she was convicted after a trial upon stipulated facts. The Court of Appeals reversed, finding the search of the respondent's person to have been unlawful. We granted certiorari to consider whether any right of the respondent guaranteed by the Fourth Amendment was violated in the circumstances presented by this case. 444 U. S. 822.

I

At the hearing in the trial court on the respondent's motion to suppress, it was established how the heroin she was charged with possessing had been obtained from her. The respondent arrived at the Detroit Metropolitan Airport on a commercial airline flight from Los Angeles early in the morning on February 10, 1976. As she disembarked from the airplane, she was observed by two agents of the DEA, who were present at the airport for the purpose of detecting unlawful traffic in narcotics. After observing the respondent's conduct, which appeared to the agents to be characteristic of persons unlawfully carrying narcotics,[1] the agents approached her as she was walking through the concourse, identified themselves as federal

[1] The agent testified that the respondent's behavior fit the so-called "drug courier profile"—an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs. In this case the agents thought it relevant that (1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.

agents, and asked to see her identification and airline ticket. The respondent produced her driver's license, which was in the name of Sylvia Mendenhall, and, in answer to a question of one of the agents, stated that she resided at the address appearing on the license. The airline ticket was issued in the name of "Annette Ford." When asked why the ticket bore a name different from her own, the respondent stated that she "just felt like using that name." In response to a further question, the respondent indicated that she had been in California only two days. Agent Anderson then specifically identified himself as a federal narcotics agent and, according to his testimony, the respondent "became quite shaken, extremely nervous. She had a hard time speaking."

After returning the airline ticket and driver's license to her, Agent Anderson asked the respondent if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request. The office, which was located up one flight of stairs about 50 feet from where the respondent had first been approached, consisted of a reception area adjoined by three other rooms. At the office the agent asked the respondent if she would allow a search of her person and handbag and told her that she had the right to decline the search if she desired. She responded: "Go ahead." She then handed Agent Anderson her purse, which contained a receipt for an airline ticket that had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles. The agent asked whether this was the ticket that she had used for her flight to California, and the respondent stated that it was.

A female police officer then arrived to conduct the search of the respondent's person. She asked the agents if the respondent had consented to be searched. The agents said that she had, and the respondent followed the policewoman into a private room. There the policewoman again asked the respondent if she consented to the search, and the respondent

replied that she did. The policewoman explained that the search would require that the respondent remove her clothing. The respondent stated that she had a plane to catch and was assured by the policewoman that if she were carrying no narcotics, there would be no problem. The respondent then began to disrobe without further comment. As the respondent removed her clothing, she took from her undergarments two small packages, one of which appeared to contain heroin, and handed both to the policewoman. The agents then arrested the respondent for possessing heroin.

It was on the basis of this evidence that the District Court denied the respondent's motion to suppress. The court concluded that the agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry* v. *Ohio*, 392 U. S. 1, and *United States* v. *Brignoni-Ponce*, 422 U. S. 873, finding that this conduct was based on specific and articulable facts that justified a suspicion of criminal activity. The court also found that the respondent had not been placed under arrest or otherwise detained when she was asked to accompany the agents to the DEA office, but had accompanied the agents "'voluntarily in a spirit of apparent cooperation.'" It was the court's view that no arrest occurred until after the heroin had been found. Finally, the trial court found that the respondent "gave her consent to the search [in the DEA office] and . . . such consent was freely and voluntarily given."

The Court of Appeals reversed the respondent's subsequent conviction, stating only that "the court concludes that this case is indistinguishable from *United States* v. *McCaleb*," 552 F. 2d 717 (CA6 1977).[2] In *McCaleb* the Court of Appeals had suppressed heroin seized by DEA agents at the Detroit Airport in circumstances substantially similar to those in the

[2] The opinion of the Court of Appeals and the opinion of the District Court are both unreported.

present case.[3] The Court of Appeals there disapproved the Government's reliance on the so-called "drug courier profile," and held that the agents could not reasonably have suspected criminal activity in that case, for the reason that "the activities of the [persons] observed by DEA agents, were consistent with innocent behavior," *id.*, at 720. The Court of Appeals further concluded in *McCaleb* that, even if the initial approach had been permissible, asking the suspects to accompany the agents to a private room for further questioning constituted an arrest requiring probable cause. Finally, the court in *McCaleb* held that the consent to the search in that case had not been voluntarily given, principally because it was the fruit of what the court believed to have been an unconstitutional detention.

On rehearing en banc of the present case, the Court of Appeals reaffirmed its original decision, stating simply that the respondent had not validly consented to the search "within the meaning of [*McCaleb*]." 596 F. 2d 706, 707.

II

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." There is no question in this case that the respondent possessed this constitutional right of personal security as she walked through the Detroit Airport, for "the Fourth Amendment protects people, not places," *Katz* v. *United States*, 389 U. S. 347, 351. Here the Government concedes that its agents had neither a warrant nor probable cause to believe that the respondent was carrying narcotics when

[3] The *McCaleb* case, however, involved a circumstance not present here. Although the persons searched in that case were advised of their right to decline to give consent to the search of their luggage, they were also informed that if they refused they would be detained while the agents sought a search warrant. 552 F. 2d, at 719. The Court of Appeals in this case evidently considered the distinction irrelevant.

the agents conducted a search of the respondent's person. It is the Government's position, however, that the search was conducted pursuant to the respondent's consent,[4] and thus was excepted from the requirements of both a warrant and probable cause. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218. Evidently, the Court of Appeals concluded that the respondent's apparent consent to the search was in fact not voluntarily given and was in any event the product of earlier official conduct violative of the Fourth Amendment. We must first consider, therefore, whether such conduct occurred, either on the concourse or in the DEA office at the airport.

A

The Fourth Amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. *Davis* v. *Mississippi*, 394 U. S. 721 (1969); *Terry* v. *Ohio*, 392 U. S. 1, 16–19 (1968)." *United States* v. *Brignoni-Ponce*, *supra*, at 878.[5] Accordingly, if the respondent was "seized" when the DEA

[4] The Government has made several alternative arguments in this case.

[5] In the District Court and the Court of Appeals, the parties evidently assumed that the respondent was seized when she was approached on the airport concourse and was asked if she would show her identification and airline ticket. In its brief on the merits and oral argument in this Court, however, the Government has argued that no seizure occurred, and the respondent has joined the argument. While the Court ordinarily does not consider matters neither raised before nor decided by the courts below, see *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147, n. 2, it has done so in exceptional circumstances. See *Youakim* v. *Miller*, 425 U. S. 231, 234; *Duignan* v. *United States*, 274 U. S. 195, 200. We consider the Government's contention that there was no seizure of the respondent in this case, because the contrary assumption, embraced by the trial court and the Court of Appeals, rests on a serious misapprehension of federal constitutional law. And because the determination of the question is essential to the correct disposition of the other issues in the case, we shall treat it as "fairly comprised" by the questions presented in the petition for certiorari. This Court's Rule 23 (1)(c). See *Procunier* v. *Navarette*, 434

agents approached her on the concourse and asked questions of her, the agents' conduct in doing so was constitutional only if they reasonably suspected the respondent of wrongdoing. But "[o]bviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry* v. *Ohio*, 392 U. S., at 19, n. 16.

The distinction between an intrusion amounting to a "seizure" of the person and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts of *Terry* v. *Ohio*, which the Court recounted as follows: "Officer McFadden approached the three men, identified himself as a police officer and asked for their names. . . . When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." *Id.*, at 6–7. Obviously the officer "seized" Terry and subjected him to a "search" when he took hold of him, spun him around, and patted down the outer surfaces of his clothing, *id.*, at 19. What was not determined in that case, however, was that a seizure had taken place before the officer physically restrained Terry for purposes of searching his per-

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U. S. 555, 559–560, n. 6; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320–321, n. 6.

The evidentiary record in the trial court is adequate to permit consideration of the contention. The material facts are not disputed. A major question throughout the controversy has been whether the respondent was at any time detained by the DEA agents. Counsel for the respondent has argued that she was arrested while proceeding through the concourse. The trial court and the Court of Appeals characterized the incident as an "investigatory stop." But the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to determine. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226; *Bumper* v. *North Carolina*, 391 U. S. 543, 548–550.

son for weapons. The Court "assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred." *Id.*, at 19, n. 16. The Court's assumption appears entirely correct in view of the fact, noted in the concurring opinion of MR. JUSTICE WHITE, that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets," *id.*, at 34. Police officers enjoy "the liberty (again, possessed by every citizen) to address questions to other persons," *id.*, at 31, 32–33 (Harlan, J., concurring), although "ordinarily the person addressed has an equal right to ignore his interrogator and walk away." *Ibid.*

Similarly, the Court in *Sibron* v. *New York*, 392 U. S. 40, a case decided the same day as *Terry* v. *Ohio*, indicated that not every encounter between a police officer and a citizen is an intrusion requiring an objective justification. In that case, a police officer, before conducting what was later found to have been an unlawful search, approached Sibron in a restaurant and told him to come outside, which Sibron did. The Court had no occasion to decide whether there was a "seizure" of Sibron inside the restaurant antecedent to the seizure that accompanied the search. The record was "barren of any indication whether Sibron accompanied [the officer] outside in submission to a show of force or authority which left him no choice, or *whether he went voluntarily in a spirit of apparent cooperation* with the officer's investigation." 392 U. S., at 63 (emphasis added). Plainly, in the latter event, there was no seizure until the police officer in some way demonstrably curtailed Sibron's liberty.

We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive inter-

ference by enforcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

Moreover, characterizing every street encounter between a citizen and the police as a "seizure," while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. "Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. *Haynes* v. *Washington*, 373 U. S. 503, 515." *Schneckloth* v. *Bustamonte*, 412 U. S., at 225.

We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.[6] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See *Terry* v. *Ohio*, *supra*, at 19, n. 16; *Dunaway* v.

[6] We agree with the District Court that the subjective intention of the DEA agent in this case to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent.

New York, 442 U. S. 200, 207, and n. 6; 3 W. LaFave, Search and Seizure 53–55 (1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See *Terry* v. *Ohio*, 392 U. S., at 31, 32–33 (Harlan, J., concurring). See also ALI, Model Code of Pre-Arraignment Procedure § 110.1 (1) and commentary, at 257–261 (1975). In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed. See *Schneckloth* v. *Bustamonte*, *supra*. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement

officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

The Court's decision last Term in *Brown* v. *Texas*, 443 U. S. 47, on which the respondent relies, is not apposite. It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him," *id.*, at 49. Up to this point there was no seizure. But after continuing to protest the officers' power to interrogate him, Brown was first frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information." The Court simply held in that case that because the officers had no reason to suspect Brown of wrongdoing, there was no basis for detaining him, and therefore no permissible foundation for applying the state statute in the circumstances there presented. *Id.*, at 52–53.

The Court's decisions involving investigatory stops of automobiles do not point in any different direction. In *United States* v. *Brignoni-Ponce*, 422 U. S. 873, the Court held that a roving patrol of law enforcement officers could stop motorists in the general area of an international border for brief inquiry into their residence status only if the officers reasonably suspected that the vehicle might contain aliens who were illegally in the country. *Id.*, at 881–882. The Government did not contend in that case that the persons whose automobiles were detained were not seized. Indeed, the Government acknowledged that the occupants of a detained vehicle were required to respond to the officers' questions and on some occasions to produce documents evidencing their eligibility to be in the United States. *Id.*, at 880. Moreover, stopping or diverting an automobile in transit, with the attendant opportunity for

a visual inspection of areas of the passenger compartment not otherwise observable, is materially more intrusive than a question put to a passing pedestrian, and the fact that the former amounts to a seizure tells very little about the constitutional status of the latter. See also *Delaware* v. *Prouse*, 440 U. S. 648; *United States* v. *Martinez-Fuerte*, 428 U. S., at 556–559.

B

Although we have concluded that the initial encounter between the DEA agents and the respondent on the concourse at the Detroit Airport did not constitute an unlawful seizure, it is still arguable that the respondent's Fourth Amendment protections were violated when she went from the concourse to the DEA office. Such a violation might in turn infect the subsequent search of the respondent's person.

The District Court specifically found that the respondent accompanied the agents to the office " 'voluntarily in a spirit of apparent cooperation,' " quoting *Sibron* v. *New York*, 392 U. S., at 63. Notwithstanding this determination by the trial court, the Court of Appeals evidently concluded that the agents' request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful. But because the trial court's finding was sustained by the record, the Court of Appeals was mistaken in substituting for that finding its view of the evidence. See *Jackson* v. *United States*, 122 U. S. App. D. C. 324, 353 F. 2d 862 (1965).

The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances, *Schneckloth* v. *Bustamonte*, 412 U. S., at 227, and is a matter which the Government has the burden of proving. *Id.*, at 222, citing *Bumper* v. *North Carolina*, 391 U. S. 543, 548. The respondent herself did not testify at the hearing. The Government's evidence showed that the respondent was not told that she

had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.

On the other hand, it is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males. While these factors were not irrelevant, see *Schneckloth* v. *Bustamonte, supra,* at 226, neither were they decisive, and the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office.

C

Because the search of the respondent's person was not preceded by an impermissible seizure of her person, it cannot be contended that her apparent consent to the subsequent search was infected by an unlawful detention. There remains to be considered whether the respondent's consent to the search was for any other reason invalid. The District Court explicitly credited the officers' testimony and found that the "consent was freely and voluntarily given," citing *Schneckloth* v. *Bustamonte, supra.* There was more than enough evidence in this case to sustain that view. First, we note that the respondent, who was 22 years old and had an 11th-grade education, was plainly capable of a knowing consent. Second, it is especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it. Although the Constitution does not require "proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search," *id.,* at 234 (footnote omitted), such knowledge

was highly relevant to the determination that there had been consent. And, perhaps more important for present purposes, the fact that the officers themselves informed the respondent that she was free to withhold her consent substantially lessened the probability that their conduct could reasonably have appeared to her to be coercive.

Counsel for the respondent has argued that she did in fact resist the search, relying principally on the testimony that when she was told that the search would require the removal of her clothing, she stated to the female police officer that "she had a plane to catch." But the trial court was entitled to view the statement as simply an expression of concern that the search be conducted quickly. The respondent had twice unequivocally indicated her consent to the search, and when assured by the police officer that there would be no problem if nothing were turned up by the search, she began to undress without further comment.

Counsel for the respondent has also argued that because she was within the DEA office when she consented to the search, her consent may have resulted from the inherently coercive nature of those surroundings. But in view of the District Court's finding that the respondent's presence in the office was voluntary, the fact that she was there is little or no evidence that she was in any way coerced. And in response to the argument that the respondent would not voluntarily have consented to a search that was likely to disclose the narcotics that she carried, we repeat that the question is not whether the respondent acted in her ultimate self-interest, but whether she acted voluntarily.[7]

III

We conclude that the District Court's determination that the respondent consented to the search of her person "freely

[7] It is arguable that the respondent may have thought she was acting in her self-interest, by voluntarily cooperating with the officers in the hope of receiving more lenient treatment.

and voluntarily" was sustained by the evidence and that the Court of Appeals was, therefore, in error in setting it aside. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

I join Parts I, II–B, II–C, and III of the Court's opinion. Because neither of the courts below considered the question, I do not reach the Government's contention that the agents did not "seize" the respondent within the meaning of the Fourth Amendment. In my view, we may assume for present purposes that the stop did constitute a seizure.[1] I would hold—as did the District Court—that the federal agents had reasonable suspicion that the respondent was engaging in criminal activity, and, therefore, that they did not violate the Fourth Amendment by stopping the respondent for routine questioning.

I

The relevant facts may be stated briefly. The respondent arrived at the Detroit Metropolitan Airport on a flight from Los Angeles. She was the last passenger to leave the aircraft.

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[1] MR. JUSTICE STEWART concludes in Part II–A that there was no "seizure" within the meaning of the Fourth Amendment. He reasons that such a seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ante*, at 554. MR. JUSTICE STEWART also notes that "'[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.'" *Ante*, at 553, quoting *Terry* v. *Ohio*, 392 U. S. 1, 34 (1968) (WHITE, J., concurring). I do not necessarily disagree with the views expressed in Part II–A. For me, the question whether the respondent in this case reasonably could have thought she was free to "walk away" when asked by two Government agents for her driver's license and ticket is extremely close.

Two agents of the Drug Enforcement Administration watched the respondent enter the terminal, walk to the baggage area, then change directions and proceed to an Eastern Airlines ticket counter. After the respondent accepted a boarding pass for a flight to Pittsburgh, the two agents approached her. They identified themselves as federal officers, and requested some identification. The respondent gave them her driver's license and airline ticket. The agents asked the respondent several brief questions. The respondent accompanied the agents to an airport office where a body search conducted by a female police officer revealed two plastic bags of heroin.

II

Terry v. *Ohio*, 392 U. S. 1 (1968), establishes that a reasonable investigative stop does not offend the Fourth Amendment.[2] The reasonableness of a stop turns on the facts and circumstances of each case. In particular, the Court has emphasized (i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise. See *Brown* v. *Texas*, 443 U. S. 47, 50–51 (1979); *Delaware* v. *Prouse*, 440 U. S. 648, 654–655 (1979); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 879–883 (1975); *Terry* v. *Ohio*, *supra*, at 20–22.

A

The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic

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[2] The *Terry* Court held that the Warrant Clause of the Fourth Amendment does not apply to a "stop." This category of police conduct must survive only the Fourth Amendment's prohibition of "unreasonable searches and seizures." 392 U. S., at 20.

is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

To meet this pressing concern, the Drug Enforcement Administration since 1974 has assigned highly skilled agents to the Detroit Airport as part of a nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States. Federal agents have developed "drug courier profiles" that describe the characteristics generally associated with narcotics traffickers. For example, because the Drug Enforcement Administration believes that most drugs enter Detroit from one of four "source" cities (Los Angeles, San Diego, Miami, or New York), agents pay particular attention to passengers who arrive from those places. See *United States* v. *Van Lewis*, 409 F. Supp. 535, 538 (ED Mich. 1976), aff'd, 556 F. 2d 385 (CA6 1977). During the first 18 months of the program, agents watching the Detroit Airport searched 141 persons in 96 encounters. They found controlled substances in 77 of the encounters and arrested 122 persons. 409 F. Supp., at 539. When two of these agents stopped the respondent in February 1976, they were carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution.

B

Our cases demonstrate that "the scope of [a] particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness." *Terry* v. *Ohio*, *supra*, at 18, n. 15.[3] The intrusion in this case was quite

[3] For example, in *Delaware* v. *Prouse*, 440 U. S. 648 (1979), we considered the justification necessary for a random stop of a moving vehicle. Such stops, which may take place at night or on infrequently traveled

modest. Two plainclothes agents approached the respondent as she walked through a public area. The respondent was near airline employees from whom she could have sought aid had she been accosted by strangers. The agents identified themselves and asked to see some identification. One officer asked the respondent why her airline ticket and her driver's license bore different names. The agent also inquired how long the respondent had been in California. Unlike the petitioner in *Terry, supra,* at 7, the respondent was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, the respondent could not reasonably have felt frightened or isolated from assistance.

C

In reviewing the factors that led the agents to stop and question the respondent, it is important to recall that a trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Brown* v. *Texas, supra,* at 52, n. 2. Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices. Law enforcement officers may rely on the "characteristics of the

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roads, interfere with freedom of movement, are inconvenient, and may be frightening. *Id.,* at 657. Thus, we held that police may not stop a moving vehicle without articulable and reasonable suspicion of unlawful activity. We explicitly distinguished our earlier decision in *United States* v. *Martinez-Fuerte,* 428 U. S. 543 (1976), which did not require individualized suspicion for the stop of a motor vehicle at a fixed checkpoint, because a checkpoint stop constitutes a "lesser intrusion" than a random stop. 440 U. S., at 656. The motorist halted at a permanent checkpoint has less reason for anxiety because he " 'can see that other vehicles are being stopped [and] can see visible signs of the officers' authority. . . .' " *United States* v. *Martinez-Fuerte, supra,* at 558, quoting *United States* v. *Ortiz,* 422 U. S. 891, 895 (1975).

area," and the behavior of a suspect who appears to be evading police contact. *United States* v. *Brignoni-Ponce*, 422 U. S., at 884–885. "In all situations the officer is entitled to assess the facts in light of his experience." *Id.*, at 885.

The two officers who stopped the respondent were federal agents assigned to the Drug Enforcement Administration. Agent Anderson, who initiated the stop and questioned the respondent, had 10 years of experience and special training in drug enforcement. He had been assigned to the Detroit Airport, known to be a crossroads for illicit narcotics traffic,[4] for over a year and he had been involved in approximately 100 drug-related arrests. App. 7–8.

The agents observed the respondent as she arrived in Detroit from Los Angeles. The respondent, who appeared very nervous, engaged in behavior that the agents believed was designed to evade detection. She deplaned only after all other passengers had left the aircraft. Agent Anderson testified that drug couriers often disembark last in order to have a clear view of the terminal so that they more easily can detect government agents. *Id.*, at 9. Once inside the terminal the respondent scanned the entire gate area and walked "very, very slowly" toward the baggage area. *Id.*, at 10 (testimony of Agent Anderson). When she arrived there, she claimed no baggage. Instead, she asked a skycap for directions to the Eastern Airlines ticket counter located in a different terminal. Agent Anderson stood in line immediately behind the respondent at the ticket counter. Although she carried an American Airlines ticket for a flight from Detroit to Pittsburgh, she asked for an Eastern Airlines ticket. An airline employee gave her an Eastern Airlines boarding pass. *Id.*, at 10–11. Agent Anderson testified that drug couriers frequently travel with-

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[4] From 1975 through 1978, more than 135 pounds of heroin and 22 pounds of cocaine were seized at the Detroit Airport. In 1978, 1,536 dosage units of other dangerous drugs were discovered there. See 596 F. 2d 706, 708, n. 1 (CA6 1979) (Weick, J., dissenting).

out baggage and change flights en route to avoid surveillance. *Ibid.* On the basis of these observations, the agents stopped and questioned the respondent.

III

The District Court, which had an opportunity to hear Agent Anderson's testimony and judge his credibility, concluded that the decision to stop the respondent was reasonable.[5] I agree. The public interest in preventing drug traffic is great, and the intrusion upon the respondent's privacy was minimal. The specially trained agents acted pursuant to a well-planned, and effective, federal law enforcement program. They observed respondent engaging in conduct that they reasonably associated with criminal activity. Furthermore, the events occurred in an airport known to be frequented by drug couriers.[6] In light of all of the circumstances, I would hold that the agents possessed reasonable and articulable suspicion of criminal activity when they stopped the respondent in a public place and asked her for identification.

The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures. In applying

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[5] Although the Court of Appeals reversed the judgment of the District Court, it did not explicitly reject this conclusion of law. See *id.*, at 707. The dissenting judge noted that the Court of Appeals failed to take issue with the District Court's conclusion that the agents had reasonable suspicion to make the investigatory stop. *Id.*, at 709 (Weick, J.).

[6] The results of the Drug Enforcement Agency's efforts at the Detroit Airport, see *supra*, at 562, support the conclusion that considerable drug traffic flows through the Detroit Airport. Contrary to MR. JUSTICE WHITE's apparent impression, *post*, at 573–574, n. 11, I do not believe that these statistics establish by themselves the reasonableness of this search. Nor would reliance upon the "drug courier profile" necessarily demonstrate reasonable suspicion. Each case raising a Fourth Amendment issue must be judged on its own facts.

a test of "reasonableness," courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience. The careful and commendable police work that led to the criminal conviction at issue in this case satisfies the requirements of the Fourth Amendment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today concludes that agents of the Drug Enforcement Administration (DEA) acted lawfully in stopping a traveler changing planes in an airport terminal and escorting her to a DEA office for a strip-search of her person. This result is particularly curious because a majority of the Members of the Court refuse to reject the conclusion that Ms. Mendenhall was "seized," while a separate majority decline to hold that there were reasonable grounds to justify a seizure. MR. JUSTICE STEWART concludes that the DEA agents acted lawfully, regardless of whether there were any reasonable grounds for suspecting Ms. Mendenhall of criminal activity, because he finds that Ms. Mendenhall was not "seized" by the DEA agents, even though throughout the proceedings below the Government never questioned the fact that a seizure had occurred necessitating a showing of antecedent reasonable suspicion. MR. JUSTICE POWELL's opinion concludes that even though Ms. Mendenhall may have been "seized," the seizure was lawful because her behavior while changing planes in the airport provided reasonable suspicion that she was engaging in criminal activity. The Court then concludes, based on the absence of evidence that Ms. Mendenhall resisted her detention, that she voluntarily consented to being taken to the DEA office, even though she in fact had no choice in the matter. This conclusion is inconsistent with our recognition that consent cannot be presumed from a

showing of acquiescence to authority, and it cannot be reconciled with our decision last Term in *Dunaway* v. *New York*, 442 U. S. 200 (1979).

I

Beginning with *Terry* v. *Ohio*, 392 U. S. 1, 16 (1968), the Court has recognized repeatedly that the Fourth Amendment's proscription of unreasonable "seizures" protects individuals during encounters with police that do not give rise to an arrest. *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556 (1976); *Delaware* v. *Prouse*, 440 U. S. 648, 653 (1979). In *Terry* we "emphatically reject[ed]" the notion that a "stop" "is outside the purview of the Fourth Amendment because . . . [it is not a] 'seizure' within the meaning of the Constitution." 392 U. S., at 16. We concluded that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." *Id.*, at 18, n. 15. Applying this principle,

> "[w]e have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity, as is required for a traditional arrest. However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown* v. *Texas*, 443 U. S. 47, 51 (1979) (citations omitted).

Throughout the lower court proceedings in this case, the Government never questioned that the initial stop of Ms. Mendenhall was a "seizure" that required reasonable suspicion. Rather, the Government sought to justify the stop by arguing that Ms. Mendenhall's behavior had given rise to

reasonable suspicion because it was consistent with portions of the so-called "drug courier profile," an informal amalgam of characteristics thought to be associated with persons carrying illegal drugs.[1] Having failed to convince the Court of Appeals that the DEA agents had reasonable suspicion for the stop, the Government seeks reversal here by arguing for the first time that no "seizure" occurred, an argument that MR. JUSTICE STEWART now accepts, thereby pretermitting the question whether there was reasonable suspicion to stop Ms. Mendenhall. MR. JUSTICE STEWART's opinion not only is

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[1] On August 18, 1976, the Government argued in its answer to Ms. Mendenhall's suppression motion that the "investigatory stop" of Ms. Mendenhall was reasonable in light of the observations made by the DEA agents. At the suppression hearing on October 18, 1976, Agent Anderson's testimony focused on explanation of the "drug courier profile," description of Ms. Mendenhall's behavior prior to the stop, and discussion of why he thought it suspicious. The United States Attorney at the suppression hearing told the court that "it is the Government's contention here that we have a valid investigatory stop, followed by a consent to search." App. 28. Noting that "[u]nder *Terry* v. *Ohio*, in order for it to be a valid stop," there must be "a reasonable suspicion that there was a crime afoot," the Government argued that the observations and experience of the DEA agents warranted a finding that reasonable suspicion existed to justify the stop. *Id.*, at 28–30. The District Court denied the suppression motion, holding that Agent Anderson had reasonable suspicion to justify "a *Terry* type intrusion in order to determine defendant's identity and obtain more information. . . ." App. to Pet. for Cert. 15a.

There is no indication that the Government on appeal, before either the original panel of the Court of Appeals or the en banc court, ever questioned the understanding that the stop of Ms. Mendenhall constituted a "seizure" requiring reasonable suspicion. Neither the majority of the en banc court nor the dissenting judge questioned the District Court's acknowledgment that reasonable suspicion was required to justify the initial stop of Ms. Mendenhall. Even in its petition for certiorari, the Government did not ask this Court to review the question whether a "seizure" had occurred. In the course of arguing that the quantum of suspicion necessary to justify the stop was slight, the Government did note that it was "arguable" that Ms. Mendenhall had not been "seized," but it was content to assume that she had been. Pet. for Cert. 19.

inconsistent with our usual refusal to reverse judgments on grounds not raised below, but it also addresses a fact-bound question with a totality-of-circumstances assessment that is best left in the first instance to the trial court, particularly since the question was not litigated below and hence we cannot be sure is adequately addressed by the record before us.[2]

MR. JUSTICE STEWART believes that a "seizure" within the meaning of the Fourth Amendment occurs when an individual's freedom of movement is restrained by means of physical force or a show of authority. Although it is undisputed that Ms. Mendenhall was not free to leave after the DEA agents stopped her and inspected her identification, App. 19, MR. JUSTICE STEWART concludes that she was not "seized" because he finds that, under the totality of the circumstances,

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[2] MR. JUSTICE STEWART's suggestion that "exceptional circumstances" justify entertaining the Government's claim that no seizure occurred, even though it was not raised below, *ante*, at 551, n. 5, is as curious as his notion that the evidentiary record "is adequate to permit consideration of the contention." *Ante*, at 552, n. 5. The principal question throughout the controversy over the initial stop was not "whether the respondent was at any time detained by the DEA agents," *ibid.*, but rather whether there was reasonable suspicion to support the stop. See *ante*, at 547, n. 1. While there was no material factual dispute concerning what the DEA agents observed that allegedly gave rise to reasonable suspicion, once the Government raised the "seizure" question before this Court, there were substantial differences between the parties concerning the nature of the encounter between Ms. Mendenhall and the DEA agents. Thus the District Court's assumption that Ms. Mendenhall had been "seized" was not based on "a serious misapprehension of federal constitutional law," *ante*, at 551, n. 5, for it just as easily could have been based on a different understanding of what the facts would show were the "seizure" question addressed in the District Court. Equally deficient is the suggestion in MR. JUSTICE STEWART's opinion that "exceptional circumstances" exist because "determination of the ['seizure'] question is essential to the correct disposition of the other issues in the case." *Ibid.* While the assumption that a "seizure" occurred makes it necessary to reach the question whether there was reasonable suspicion for the stop, it would not affect the way in which that question would be decided when reached.

a reasonable person would have believed that she was free to leave. While basing this finding on an alleged absence from the record of objective evidence indicating that Ms. Mendenhall was not free to ignore the officer's inquiries and continue on her way, MR. JUSTICE STEWART's opinion brushes off the fact that this asserted evidentiary deficiency may be largely attributable to the fact that the "seizure" question was never raised below. In assessing what the record does reveal, the opinion discounts certain objective factors that would tend to support a "seizure" finding,[3] while relying on contrary factors inconclusive even under its own illustrations of how a "seizure" may be established.[4] Moreover, although MR. JUSTICE STEWART's opinion purports to make its "seizure" finding turn on objective factors known to the person accosted, in distinguishing prior decisions holding that investigatory stops constitute "seizures," it does not rely on differences in the extent to which persons accosted could reasonably believe that they were free to leave.[5] Even if one

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[3] Not the least of these factors is the fact that the DEA agents for a time took Ms. Mendenhall's plane ticket and driver's license from her. It is doubtful that any reasonable person about to board a plane would feel free to leave when law enforcement officers have her plane ticket.

[4] MR. JUSTICE STEWART notes, for example, that a "seizure" might be established even if the suspect did not attempt to leave, by the nature of the language or tone of voice used by the officers, factors that were never addressed at the suppression hearing, very likely because the "seizure" question was not raised.

[5] In *Brown* v. *Texas*, 443 U. S. 47, 51 (1979), and *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), the prosecution, as here, did not question whether the suspects who had been stopped had been "seized," given its concessions that the suspects would not have been permitted to leave without responding to the officers' requests for identification. In each case the Court recognized that a "seizure" had occurred without inquiring into whether a reasonable person would have believed that he was not free to leave. MR. JUSTICE STEWART's present attempt to distinguish the fact that stops of automobiles constitute "seizures," on the ground that it is more intrusive to visually inspect the passenger compartment of a car, confuses the question of the quantum of reasonable suspicion neces-

believes the Government should be permitted to raise the "seizure" question in this Court, the proper course would be to direct a remand to the District Court for an evidentiary hearing on the question, rather than to decide it in the first instance in this Court.[6]

II

Assuming, as we should, that Ms. Mendenhall was "seized" within the meaning of the Fourth Amendment when she was stopped by the DEA agents, the legality of that stop turns on whether there were reasonable grounds for suspecting her of criminal activity at the time of the stop. *Brown* v. *Texas*, 443 U. S., at 51. To establish that there was reasonable suspicion for the stop, it was necessary for the police at least to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U. S., at 21.

At the time they stopped Ms. Mendenhall, the DEA agents' suspicion that she was engaged in criminal activity was based solely on their brief observations of her conduct at the airport.[7] The officers had no advance information that Ms. Men-

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sary to justify such "seizures" with the question whether a "seizure" has occurred.

[6] We found that exceptional circumstances warranted consideration of a question not raised below in *Youakim* v. *Miller*, 425 U. S. 231, 234–235 (1976), which is cited in MR. JUSTICE STEWART's opinion, but there we vacated the judgment and remanded the case, holding that "the claim should be aired first in the District Court." *Id.*, at 236. Cf. *Rios* v. *United States*, 364 U. S. 253 (1960) (remanding to the trial court for determination of when an arrest occurred, after deciding probable-cause question).

[7] Officer Anderson, the DEA agent who testified at the suppression hearing, stated on cross-examination:

"Q. Did you have a tip in this case?

"A. No.

"Q. You were going strictly on what you saw in the airport, is that right?

denhall, or anyone on her flight, would be carrying drugs. What the agents observed Ms. Mendenhall do in the airport was not "unusual conduct" which would lead an experienced officer reasonably to conclude that criminal activity was afoot, *id.*, at 30, but rather the kind of behavior that could reasonably be expected of anyone changing planes in an airport terminal.

None of the aspects of Ms. Mendenhall's conduct, either alone or in combination, were sufficient to provide reasonable suspicion that she was engaged in criminal activity. The fact that Ms. Mendenhall was the last person to alight from a flight originating in Los Angeles was plainly insufficient to provide a basis for stopping her. Nor was the fact that her flight originated from a "major source city," for the mere proximity of a person to areas with a high incidence of drug activity or to persons known to be drug addicts, does not provide the necessary reasonable suspicion for an investigatory stop. *Ybarra* v. *Illinois*, 444 U. S. 85 (1979); *Brown* v. *Texas*, *supra*; *Sibron* v. *New York*, 392 U. S. 40, 62 (1968).[8]

"A. A number of things, what my observations, her response to statements.

"Q. I'm just asking—

"A. (Interposing) All right. Itinerary.

"Q. You're going on what happened on February 10 without any prior information?

"A. Correct.

"Q. You did not know that Sylvia Mendenhall was traveling to Detroit with narcotics, did you?

"A. No.

"Q. Nor any Negro female traveling from Los Angeles on that date carrying narcotics, did you?

"A. No." App 18.

[8] If "[t]he inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security," *Sibron* v. *New York*, 392 U. S., at 62, then the fact that a person is on a flight that originated from a major "source city" certainly is not.

Under the circumstances of this case, the DEA agents' observations that Ms. Mendenhall claimed no luggage and changed airlines were also insufficient to provide reasonable suspicion. Unlike the situation in *Terry* v. *Ohio*, 392 U. S., at 28, where "nothing in [the suspects'] conduct from the time [the officer] first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate [his] hypothesis" of criminal behavior, Ms. Mendenhall's subsequent conduct negated any reasonable inference that she was traveling a long distance without luggage or changing her ticket to a different airline to avoid detection. Agent Anderson testified that he heard the ticket agent tell Ms. Mendenhall that her ticket to Pittsburgh already was in order and that all she needed was a boarding pass for the flight.[9] Thus it should have been plain to an experienced observer that Ms. Mendenhall's failure to claim luggage was attributable to the fact that she was already ticketed through to Pittsburgh on a different airline.[10] Because Agent Anderson's suspicion that Ms. Mendenhall was transporting narcotics could be based only on "his inchoate and unparticularized suspicion or 'hunch,'" rather than "specific reasonable inferences which he is entitled to draw from the facts in light of his experience," *id.*, at 27, he was not justified in "seizing" Ms. Mendenhall.[11]

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[9] Agent Anderson testified on cross-examination at the suppression hearing that he believed Ms. Mendenhall's failure to pick up luggage was suspicious only before he learned that she was changing planes. App. 16.

[10] We recognized in *Brown* v. *Texas*, 443 U. S., at 52, n. 2, that "a trained, experienced police officer [may be] able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." By the same token, Agent Anderson's experience on airport detail may be considered as negating any reasonable inference that Ms. Mendenhall's behavior was suspicious once he learned that she only needed a boarding pass for her flight to Pittsburgh.

[11] MR. JUSTICE POWELL's conclusion that there were reasonable grounds for suspecting Ms. Mendenhall of criminal activity relies heavily on the assertion that the DEA agents "acted pursuant to a well-planned, and

III

Whatever doubt there may be concerning whether Ms. Mendenhall's Fourth Amendment interests were implicated during the initial stages of her confrontation with the DEA agents, she undoubtedly was "seized" within the meaning of the Fourth Amendment when the agents escorted her from the public area of the terminal to the DEA office for questioning and a strip-search of her person. In *Dunaway* v. *New York*, 442 U. S. 200 (1979), we held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly "was 'seized' in the Fourth Amendment sense," even though "he was not told he was under arrest." *Id.*, at 207, 203. We found it significant that the suspect was taken to a police station, "was never informed that he was 'free to go,'" and "would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody." *Id.*, at 212. Like the "seizure" in *Dunaway*, the nature of the intrusion to which Ms. Mendenhall was subjected when she was escorted by DEA agents to their office and detained there for questioning and a strip-search was so great that it "was in important respects indistinguishable from a traditional arrest." *Ibid.* Although Ms. Mendenhall was not told that she was under arrest, she in fact was not free to refuse to go to the DEA office

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effective, federal law enforcement program." *Ante*, at 565. Yet there is no indication that the asserted successes of the "drug courier program" have been obtained by reliance on the kind of nearly random stop involved in this case. Indeed, the statistics MR. JUSTICE POWELL cites on the success of the program at the Detroit Airport, *ante*, at 562, refer to the results of searches following stops "based upon information acquired from the airline ticket agents, from [the agents'] independent police work," and occasional tips, as well as observations of behavior at the airport. *United States* v. *Van Lewis*, 409 F. Supp. 535, 538 (ED Mich. 1976), aff'd, 556 F. 2d 385 (CA6 1977). Here, however, it is undisputed that the DEA agents' suspicion that Ms. Mendenhall was engaged in criminal activity was based solely on their observations of her conduct in the airport terminal. *Supra*, at 571–572, n. 7.

and was not told that she was.[12] Furthermore, once inside the office, Ms. Mendenhall would not have been permitted to leave without submitting to a strip-search.[13] Thus, as in *Dunaway*,

> "[t]he mere facts that [the suspect] was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, obviously do not make [the suspect's] seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny." *Id.*, at 212–213 (citation omitted).

Because the intrusion to which Ms. Mendenhall was subjected when she was escorted to the DEA office is of the same character as that involved in *Dunaway*, probable cause, which concededly was absent, was required to support the intrusion.

The Court's suggestion that no Fourth Amendment interest possessed by Ms. Mendenhall was implicated because she consented to go to the DEA office is inconsistent with *Dun-*

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[12] Agent Anderson testified on cross-examination at the suppression hearing:

"Q. All right. Now, when you asked her to accompany you to the DEA office for further questioning, if she had wanted to walk away, would you have stopped her?

"A. Once I asked her to accompany me?

"Q. Yes.

"A. Yes, I would have stopped her.

"Q. She was not free to leave, was she?

"A. Not at that point." App. 19.

[13] Agent Anderson testified:

"Q. Had she tried to leave that room when she was being accompanied by the female officer, would you have known?

"A. If she had attempted to leave the room?

"Q. Yes.

"A. Well yes, I could say that I would have known.

"Q. And if she had tried to leave prior to being searched by the female officer, would you have stopped her?

"A. Yes." *Id.*, at 21.

away and unsupported in the record. There was no evidence in the record to support the District Court's speculation, made before *Dunaway* was decided, that Ms. Mendenhall accompanied "Agent Anderson to the airport DEA Office 'voluntarily in a spirit of apparent cooperation with the [agent's] investigation,' *Sibron* v. *New York*, 392 U. S. 40, 63 (1968)." App. to Pet. for Cert. 16a. Ms. Mendenhall did not testify at the suppression hearing and the officers presented no testimony concerning what she said, if anything, when informed that the officers wanted her to come with them to the DEA office. Indeed, the only testimony concerning what occurred between Agent Anderson's "request" and Ms. Mendenhall's arrival at the DEA office is the agent's testimony that if Ms. Mendenhall had wanted to leave at that point she would have been forcibly restrained. The evidence of consent here is even flimsier than that we rejected in *Dunaway* where it was claimed that the suspect made an affirmative response when asked if he would accompany the officers to the police station. *Dunaway* v. *New York*, *supra*, at 223 (REHNQUIST, J., dissenting). Also in *Sibron* v. *New York*, from which the District Court culled its description of Ms. Mendenhall's "consent," we described a record in a similar state as "totally barren of any indication whether Sibron accompanied Patrolman Martin outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." 392 U. S., at 63.[14]

The Court recognizes that the Government has the burden of proving that Ms. Mendenhall consented to accompany the officers, but it nevertheless holds that the "totality of evidence was plainly adequate" to support a finding of consent.

[14] In *Sibron* v. *New York*, 392 U. S., at 45, we noted that the record revealed only that "Sibron sat down and ordered pie and coffee, and, as he was eating, Patrolman Martin approached him and told him to come outside. Once outside, the officer said to Sibron, 'You know what I am after.'"

On the record before us, the Court's conclusion can only be based on the notion that consent can be assumed from the absence of proof that a suspect resisted police authority. This is a notion that we have squarely rejected. In *Bumper* v. *North Carolina*, 391 U. S. 543, 548–549 (1968), the Court held that the prosecution's "burden of proving that the consent was, in fact, freely and voluntarily given . . . cannot be discharged by showing no more than acquiescence to a claim of lawful authority." (Footnotes omitted.) *Johnson* v. *United States*, 333 U. S. 10 (1948); *Amos* v. *United States*, 255 U. S. 313 (1921). While the Government need not prove that Ms. Mendenhall knew that she had a right to refuse to accompany the officers, *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), it cannot rely solely on acquiescence to the officers' wishes to establish the requisite consent. The Court of Appeals properly understood this in rejecting the District Court's "findings" of consent.

Since the defendant was not present to testify at the suppression hearing, we can only speculate about her state of mind as her encounter with the DEA agents progressed from surveillance, to detention, to questioning, to seclusion in a private office, to the female officer's command to remove her clothing. Nevertheless, it is unbelievable [15] that this sequence of events involved no invasion of a citizen's constitutionally protected interest in privacy. The rule of law requires a different conclusion.

Because Ms. Mendenhall was being illegally detained at the time of the search of her person, her suppression motion should have been granted in the absence of evidence to dissipate the taint.

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[15] "Will you walk into my parlour?" said the spider to a fly.
(You may find you have consented, without ever knowing why.)

HARRISON, REGIONAL ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* PPG INDUSTRIES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–1918. Argued January 16, 1980—Decided May 27, 1980

As authorized by the Clean Air Act (Act), the Environmental Protection Agency (EPA) decided, on the basis of correspondence with respondents, that certain equipment at a power generating facility of respondent PPG Industries, Inc. (PPG), was subject to certain "new source" performance standards regarding air pollution that had been promulgated by the EPA Administrator. PPG then filed a petition in the Court of Appeals for review of the EPA's decision under § 307 (b)(1) of the Act, which provides for direct review in a federal court of appeals of certain locally and regionally applicable actions taken by the Administrator under specifically enumerated provisions of the Act, and of "*any other final action* of the Administrator under [the] Act . . . which is locally or regionally applicable." Because of its uncertainty as to the proper forum for judicial review, PPG also filed suit for injunctive relief against the Administrator in a Federal District Court, which suit was stayed pending the disposition of the present case. The Court of Appeals dismissed PPG's petition for lack of jurisdiction under § 307 (b)(1).

Held: The phrase "any other final action" in § 307 (b)(1) is to be construed in accordance with its literal meaning so as to reach *any* action of the Administrator that is final, not just final actions of the Administrator similar to actions under the specifically enumerated provisions that precede the catchall phrase in the statute. Pp. 586–594.

(a) The rule of *ejusdem generis* does not apply to § 307 (b)(1) so as to limit "any other final action" to actions similar to those under the specifically enumerated provisions on the theory that the latter actions (unlike the Administrator's informal decision here) must be based on administrative proceedings reflecting at least notice and opportunity for a hearing. At least one of the specifically enumerated provisions in § 307 (b)(1) does not require the Administrator to act only after notice and opportunity for a hearing, and thus even if the rule of *ejusdem generis* were applied, it would not significantly narrow the ambit of "any other final action" under § 307 (b)(1). Moreover,

the rule of *ejusdem generis* is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty, and the phrase "*any* other final action" offers no indication whatever that Congress intended such a limiting construction of § 307 (b)(1). Pp. 587–589.

(b) Nothing in the legislative history supports a conclusion that the phrase "any other final action" in § 307 (b)(1) means anything other than what it says, or that Congress did not intend the phrase to enlarge the jurisdiction of the courts of appeals to include the review of cases based on an administrative record reflecting less than notice and an opportunity for a hearing. Pp. 589–592.

(c) The argument that, as a matter of policy, the basic purpose of § 307 (b)(1)—to provide prompt pre-enforcement review of EPA action—would be better served by providing in cases such as this for review in a district court rather than a court of appeals, is an argument to be addressed to Congress, not to this Court. Pp. 592–594.

587 F. 2d 237, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 594. BLACKMUN, J., filed an opinion concurring in the result, *post*, p. 595. REHNQUIST, J., *post*, p. 595, and STEVENS, J., *post*, p. 602, filed dissenting opinions.

Maryann Walsh argued the cause for petitioners. With her on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, William Alsup, Jacques B. Gelin,* and *Michele B. Corash.*

Charles F. Lettow argued the cause for respondents. With him on the brief were *V. Peter Wynne, Jr., Oliver P. Stockwell,* and *Gene W. Lafitte.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 307 (b)(1) of the Clean Air Act (Act) provides for direct review in a federal court of appeals of certain locally and regionally applicable actions taken by the Administrator of the Environmental Protection Agency (EPA) under specifically enumerated provisions of the Act, and of "*any other final action* of the Administrator under [the] Act . . . which is locally or regionally applicable." (Emphasis

added.)[1] The issue in this case is whether the Court of Appeals for the Fifth Circuit was correct in concluding that it was without jurisdiction under § 307 (b)(1) to entertain a petition for review in which PPG Industries, Inc. (PPG),

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[1] Section 307 (b)(1) provides in full:

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202 (b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d), any order under section 111 (j), under section 112 (c), under section 113 (d), under section 119, or under section 120, or his action under section 119* (c)(2)(*A*), (*B*), *or* (*C*) *(as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.* Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise." (Emphasis added.) § 307 (b)(1) of the Act, as added, 84 Stat. 1708, and amended by the Clean Air Act Amendments of 1977, Pub. L. 95–95, 91 Stat. 776, and the Clean Air Act Technical and Conforming Amendments, § 14 of Pub. L. 95–190, 91 Stat. 1404, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II).

and Conoco, Inc. (Conoco), the respondents here, challenged a decision of the Administrator concerning the applicability of EPA's "new source" performance standards to a power generating facility operated by PPG. More specifically, we must decide whether the Administrator's decision falls within the ambit of "any other final action" reviewable in a court of appeals under § 307 (b)(1).

I

The dispute underlying this jurisdictional question involves a decision of the Administrator under § 111 of the Act, 42 U. S. C. § 7411 (1976 ed., Supp. II). That provision requires the Administrator to publish, and from time to time to revise, a list of categories of any stationary source that he determines "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," § 111 (b)(1)(A), and to promulgate regulations establishing standards of performance for "new sources" within the list of those categories, § 111 (b)(1)(B). The Act defines a "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." § 111 (a)(2).

In 1971, the Administrator included "fossil fuel-fired steam generators" in his list of stationary sources. 36 Fed. Reg. 5931. Later that year, pursuant to his mandate to promulgate "new source" performance standards, the Administrator established certain emission limits for any "fossil fuel-fired steam generating unit" of more than 250 million Btu's per hour heat input, the construction or modification of which was commenced after August 17, 1971, the date on which the standards were proposed. 40 CFR §§ 60.1–60.15, 60.40–60.46 (1979). These "new source" regulations define the term, "fossil fuel-fired steam generating unit," § 60.41 (a), and also create a procedure under which the Administrator, upon

request, will determine whether any action taken or planned by the owner or operator of a facility constitutes or will constitute "construction" or "modification" of the facility for purposes of triggering the applicability of the performance standards. § 60.5.

Sometime in 1970, the respondent PPG, a chemical manufacturing corporation, began the planning and preliminary construction of a new power generating facility at its plant in Lake Charles, La. That facility, designed to take advantage of fuel-efficient "cogeneration" technology, was to consist of two gas turbine generators, two "waste-heat" boilers, and a turbogenerator. The dispute between EPA and PPG concerns the applicability of the "new source" performance standards to the waste-heat boilers of this facility. This controversy first arose in 1975, when the respondent Conoco, PPG's fuel supplier, informed EPA that Conoco was switching the supply of fuel to the Lake Charles facility from natural gas to fuel oil. An exchange of correspondence ensued, initiated by EPA's request that PPG submit additional information bearing on whether the waste-heat boilers were covered by the "new source" standards. PPG's submissions revealed that although assembly of the waste-heat boilers had not begun until 1976, the new power facility itself, of which the boilers were an integral component, had been originally designed and partially ordered in 1970, a year before the proposed date of the "new source" performance standards.

On the basis of PPG's submissions, the Regional Director for Enforcement of the EPA notified PPG of his conclusion that the boilers were subject to the "new source" standards, since construction of the boilers themselves had not begun until long after January 14, 1971, the date on which the standards had been proposed. In response, PPG took the position that the boilers were part of an integrated unit, the construction of which had begun in 1970, before the proposed date of the standards. The Regional Director, nevertheless, reaffirmed his initial decision.

Pursuant to the procedure outlined in the "new source" regulations, 40 CFR § 60.5 (1979), PPG then submitted a formal request for an EPA determination that (1) the "new source" standards for "fossil fuel-fired steam generators" do not apply to the type of boilers in question, and (2) in any event, since construction of the facility of which the boilers were a part began before the date on which the standards were proposed, the boilers were not "new sources" and thus not subject to the performance standards. In the event that EPA determined that PPG's waste-heat boilers were subject to the standards, PPG also requested a clarification as to how those standards would apply.

Responding to PPG's request, the Regional Administrator notified PPG by letter that he had concluded that the waste-heat boilers were, indeed, subject to the "new source" standards for "fossil fuel-fired steam generators," and rejected PPG's argument that construction of the boilers had begun with the construction of other facets of the Lake Charles facility. Thus, the Regional Administrator affirmed the previous EPA determination that the waste-heat boilers were subject to the "new source" performance standards. With regard to the manner in which those standards were to apply to the waste-heat boilers, the Regional Administrator indicated that since PPG's gas turbine generators were not subject to the "new source" standards, PPG would be held accountable only for those emissions from the waste-heat boilers attributable to the combustion of fossil fuel, not those emissions attributable to waste heat from the gas turbine generators.[2]

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[2] In a request for clarification, PPG expressed its understanding that the "new source" standards would not be applicable during the normal course of operation of the boilers, but only during performance tests or other periods when the boilers were operating on 100% fossil fuel. EPA by letter confirmed PPG's understanding. This position, however, was inconsistent with both the Regional Administrator's earlier ruling and with EPA's position in similar cases. Accordingly, an EPA representative notified PPG by telephone that the letter was incorrect. In a subsequent

PPG then filed a petition in the Court of Appeals for the Fifth Circuit, seeking review of EPA's decision concerning the applicability of the "new source" standards to its waste-heat boilers. Because of its uncertainty regarding the proper forum for judicial review, PPG also filed a complaint for injunctive relief against the Administrator in the United States District Court for the Western District of Louisiana. That suit has been stayed pending the disposition of the present case.

PPG's uncertainty, and the issue in this case, stem from conflicting views as to the proper interpretation of § 307 (b)(1) of the Act, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II). Before 1977, § 307 (b)(1) provided for exclusive review in an appropriate court of appeals of certain locally or regionally applicable actions of the Administrator under several specifically enumerated provisions of the Act. Actions of the Administrator under provisions not specifically enumerated in § 307 (b)(1) were reviewable only in a district court under its federal-question jurisdiction, 28 U. S. C. § 1331. Congress expanded the ambit of § 307 (b)(1) in 1977. The Clean Air Act Amendments of 1977, Pub. L. 95–95, 91 Stat. 776, added to the list of locally or regionally applicable actions reviewable exclusively in the appropriate court of appeals both (1) actions of the Administrator under another specifically enumerated provision of the Act, and (2) *"any other final action* of the Administrator under [the] Act which is locally or

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letter, the Director of the Division of Stationary Source Enforcement of EPA reiterated that the "new source" standards would be applicable during the normal operation of the waste-heat boilers, but only to the extent that the boilers were operating on fossil fuel, rather than waste heat. The Director also indicated that, pursuant to the standards, PPG would be required to operate the boilers at all times with fuel containing less than a certain specified content of sulfur. He further noted that PPG would be required to install and operate opacity monitors in the stacks of the boilers and to perform alternative monitoring tests.

regionally applicable." (Emphasis added.) Later in 1977, in enacting the Clean Air Act Technical and Conforming Amendments, Pub. L. 95–190, 91 Stat. 1404, Congress added several more provisions to those listed in § 307 (b)(1) under which a locally or regionally applicable action of the Administrator is reviewable in the appropriate court of appeals.

It was under § 307 (b)(1), as amended, that PPG filed a petition for review in the Court of Appeals for the Fifth Circuit. Despite having filed its petition there, PPG, and Conoco as intervenor, argued that that court was without jurisdiction, since the Administrator's decision was not an action taken under one of the provisions specifically enumerated in § 307 (b)(1), and could not be properly characterized as "any other final action of the Administrator." The latter phrase, they argued, referred only to other locally or regionally applicable final actions under the provisions of the Act specifically enumerated in § 307 (b)(1). In response, EPA argued that the phrase, "any other final action," should be read literally to mean *any* final action of the Administrator.

The Court of Appeals concluded that the Administrator's decision did not fall within the meaning of "any other final action" under § 307 (b)(1). 587 F. 2d 237. It was the court's view that "[i]f Congress intended . . . to cast the entire responsibility for reviewing all EPA action under the Act into the courts of appeals, the numeration of specific sections would appear to be redundant." *Id.*, at 243. The "most revealing" aspect of the legislative history of § 307 (b)(1), the court thought, was the complete absence of any discussion of such a "massive shift" in jurisdiction. Moreover, the court found it unlikely that Congress could have intended a shift of jurisdiction that would require the courts of appeals to review decisions of the Administrator that simply applied or interpreted his regulations, as in this case. Such a decision, the court noted, is often based on a "skeletal record" that may leave the reviewing court unable to

perform meaningful judicial review. Since an appellate court is ill-suited to augment such a record, especially when compared to a trial court in which the tools of discovery are available, the court concluded that "[w]hatever addition to the jurisdiction of the courts of appeals Congress may have contemplated by adding the 'any other final action' language to § 307 (b)(1), we assume that section was drafted with the mechanical limitations of the courts of appeals in mind." 587 F. 2d, at 245. Accordingly, the Court of Appeals dismissed PPG's petition for lack of jurisdiction under § 307 (b)(1). We granted certiorari, 444 U. S. 823, because of the importance of determining the locus of judicial review of the actions of EPA.

II

It is undisputed that the Administrator's decision concerning the applicability of the "new source" performance standards to PPG's waste-heat boilers was locally applicable action under a provision of the Act not specifically enumerated in § 307 (b)(1). The question at issue is whether the Administrator's decision falls within the scope of the phrase, "any other final action of the Administrator," so as to make that decision reviewable in a federal court of appeals under § 307 (b)(1).

At the outset, we note that the parties are in agreement that the Administrator's decision was "final action" as that term is understood in the context of the Administrative Procedure Act and other provisions of federal law. It is undisputed that the Administrator's ruling represented EPA's final determination concerning the applicability of the "new source" standards to PPG's power facility. Short of an enforcement action, EPA has rendered its last word on the matter. The controversy thus is not about whether the Administrator's decision was "final," but rather about whether it was "*any other* final action" within the meaning of § 307 (b)(1), as amended in 1977.

A

The petitioners argue that the phrase, "any other final action," should be construed in accordance with its literal meaning so as to reach *any* action of the Administrator under the Act that is "final" and not taken under a specifically enumerated provision in § 307 (b)(1). The respondents argue that the statutory language should be construed more narrowly. Relying on the familiar doctrine of *ejusdem generis*, they assert that the phrase, "any other final action," should be read not to reach all final actions of the Administrator, but rather only those similar to the actions under the specifically enumerated provisions that precede that catchall phrase in the statute.[3] The similarity that the respondents discern among the actions under the specifically enumerated provisions in § 307 (b)(1) is that those actions must be based on what the respondents refer to as "a contemporaneously compiled administrative record," by which they mean a record "based on administrative proceedings reflecting at least notice and opportunity for hearing." Since the Administrator's informal decision in this case was not based on such a record, the respondents argue that his decision was not "other final action" within the meaning of § 307 (b)(1) and thus not within the jurisdiction of the Court of Appeals.[4]

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[3] The respondents have abandoned the construction of the statute they advanced in the Court of Appeals, namely, that the phrase, "any other final action," refers only to other final actions under those provisions specifically enumerated in § 307 (b)(1). That construction, as the Court of Appeals correctly noted, is inconsistent with the fact that the phrase, "any other final action," is modified not by "under these sections," but rather by "under this Act."

[4] It would appear that the respondents' construction of the statute is that adopted by the Court of Appeals, although the matter is not free from doubt. The doubt arises from the fact that the Court of Appeals' opinion can also be read as establishing a jurisdictional test that turns on a case-by-case inquiry into the adequacy of the administrative record. But, as the respondents themselves acknowledge, that reading of the opinion would create excessive uncertainty as to the proper forum for judicial review.

The respondents' reliance on the rule of *ejusdem generis* is, we think, misplaced in two respects. Under the rule of *ejusdem generis*, where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated. Applying this rule to § 307 (b)(1), the respondents argue that "any other final action" must refer only to final actions based on an administrative record reflecting at least notice and opportunity for a hearing. The flaw in this argument is that at least one of the specifically enumerated provisions in § 307 (b)(1), namely, § 112 (c) of the Act, 42 U. S. C. § 7412 (c) (1976 ed., Supp. II), does not require the Administrator to act only after notice and opportunity for a hearing. In fact, the respondents themselves recognize that an action by the Administrator under § 112 (c) would be based on an administrative record not unlike that involved in this case.[5] Thus, even if the rule of *ejusdem generis* were applied, it would not significantly narrow the ambit of "any other final action" under § 307 (b)(1).

The second problem with the respondents' reliance on the rule of *ejusdem generis* is more fundamental. As we have often noted: " 'The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.' " *United States* v. *Powell*, 423 U. S. 87, 91, quoting *Gooch* v. *United States*, 297 U. S. 124, 128. With regard to § 307 (b)(1), we discern no uncertainty in the meaning of the phrase, "any other final action." When Congress amended the pro-

[5] The respondents argue that this exception should be ignored in applying the rule of *ejusdem generis*, since § 112 (c) governs the regulation of "hazardous air pollutants" for which Congress may have wanted "special review" in the courts of appeals, even in the absence of procedures requiring notice and opportunity for a hearing. It is our view, however, that if the rule of *ejusdem generis* is applicable, it must be applied to actions under *all* the specifically enumerated provisions in § 307 (b)(1), not simply those that fit the respondents' theory.

vision in 1977, it expanded its ambit to include not simply "other final action," but rather "*any* other final action." This expansive language offers no indication whatever that Congress intended the limiting construction of § 307 (b)(1) that the respondents now urge. Accordingly, we think it inappropriate to apply the rule of *ejusdem generis* in construing § 307 (b)(1). Rather, we agree with the petitioners that the phrase, "any other final action," in the absence of legislative history to the contrary, must be construed to mean exactly what it says, namely, *any other* final action.[6]

B

We have found nothing in the legislative history to support a conclusion that the phrase, "any other final action," in § 307 (b)(1) means anything other than what it says.

[6] The respondents raise several objections to so literal a reading of § 307 (b)(1), none of which we find persuasive. First, the respondents assert that such a construction of § 307 (b)(1) is both internally inconsistent and inconsistent with another provision of the Act. The internal inconsistency is said to arise from the fact that if the phrase, "any other final action," were construed to include *any* final action of the Administrator, it would nullify the express exception from review in § 307 (b)(1) of any "standard required to be prescribed under section 202 (b)(1)." The inconsistency with another provision in the Act is said to arise from the fact that a literal reading of "any other final action" would effectively repeal another judicial review provision in the Act, § 206 (b)(2)(B), 42 U. S. C. § 7525 (b)(2)(B) (1976 ed., Supp. II). These objections fall far short of the mark, however, for the general language of the catchall phrase, "any other final action," must obviously give way to specific express provisions in the Act.

The respondents also argue that if Congress had intended the phrase, "any other final action," to refer to *all* final actions of the Administrator, it would have been unnecessary, in 1977, to add to the list in § 307 (b)(1) of specifically enumerated provisions under which actions of the Administrator are reviewable in the courts of appeals. This may be true, but the fact remains that even if Congress had intended the phrase, "any other final action," to be read, as the respondents urge, in accordance with the rule of *ejusdem generis*, there still would have been no necessity to add to the list of specifically enumerated provisions.

Congress added the language, "any other final action," to § 307 (b)(1) in the Clean Air Act Amendments of 1977. The phrase first appeared in H. R. 6161, 95th Cong., 1st Sess. (1977). That bill, as reported out of the House Committee on Interstate and Foreign Commerce, expanded the jurisdiction of the Court of Appeals for the District of Columbia Circuit to include review of not only certain EPA actions of nationwide consequences under specifically enumerated provisions of the Act, but also "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under [the] Act." In parallel fashion, the bill expanded the jurisdiction of the regional courts of appeals to include review not only of certain local or regional actions under specifically enumerated provisions, but also of *"any other final action* of the Administrator under [the] Act which is locally or regionally applicable." (Emphasis added.)

The only extended discussion of this proposed amendment to § 307 (b)(1) was contained in the Committee Report accompanying H. R. 6161. H. R. Rep. No. 95–294, pp. 323–324 (1977). That discussion, however, focused not on the jurisdictional question at issue here, but rather on the proper venue as between the District of Columbia Circuit and the other Federal Circuits. The Committee Report described the proposed amendments as "intended to clarify some questions relating to venue for review of rules or orders under the [A]ct." *Id.*, at 323. In this regard, the Committee Report explained:

> "[The proposed addition to the first sentence of § 307 (b)(1)] makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U. S. Court of Appeals for the District of Columbia. . . .
>
> "[The proposed addition to the second sentence] provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U. S. court

> of appeals for the circuit in which such locality, State, or region is located. . . ." *Ibid.*

The Committee Report further stated that the proposed changes reflected the Committee's agreement with certain venue proposals of the Administrative Conference of the United States, but added the caveat that the adoption of these proposals was not to be taken as an endorsement of the remainder of the Administrative Conference's recommendations. *Id.*, at 324.

The respondents infer from this scant legislative history that Congress never intended the addition of the phrase, "any other final action," to § 307 (b)(1) to enlarge the jurisdiction of the courts of appeals to include the review of cases based on an administrative record reflecting less than notice and an opportunity for a hearing. But, insofar as the respondents rely on what the Committee said in its Report, we fail to see how the Committee's observations on venue have any bearing at all on the jurisdictional issue now before the Court.[7] Moreover, since the Administrative Conference had not proposed that the jurisdiction of the courts of appeals be expanded to include "any other final action," the fact that the Committee expressly disclaimed an endorsement of the recommendations of the Administrative Conference on matters other than venue would appear wholly irrelevant.

The respondents also rely on what the Committee and the

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[7] That the Committee intended the phrase, "any other final action," to result in at least some expansion of the jurisdiction of the courts of appeals is evident in the fact that the Committee Report expressly indicated that several types of nationwide actions under provisions not specifically enumerated in § 307 (b)(1) would be reviewable in the District of Columbia Circuit. See H. R. Rep. No. 95-294, pp. 323-324 (1977) (*e. g.*, regulations to carry out the nonattainment policy set out in § 117 of the Act). Thus, as even the respondents concede, the issue here is not whether Congress intended any expansion of the jurisdiction of the courts of appeals, but rather the extent to which Congress intended to expand that jurisdiction. As to that issue, the legislative history is silent.

Congress did *not* say about the 1977 amendments to § 307 (b)(1). It is unlikely, the respondents assert, that Congress would have expanded so radically the jurisdiction of the courts of appeals, and divested the district courts of jurisdiction, without some consideration and discussion of the matter. We cannot accept this argument. First, although the number of actions comprehended by a literal interpretation of "any other final action" is no doubt substantial, the number would not appear so large as ineluctably to have provoked comment in Congress. Secondly, it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.[8]

C

The respondents finally argue that, as a matter of policy, the basic purpose of § 307 (b)(1)—to provide prompt pre-enforcement review of EPA action—would be better served by providing for judicial review of cases such as this in a district court rather than a court of appeals.[9] It is the respond-

[8] Arthur Conan Doyle, The Silver Blaze, in The Complete Sherlock Holmes (1938).

[9] The respondents also argue that a literal construction of § 307 (b)(1) would violate due process of law. This argument turns on the interrelationship between § 307 (b)(1) and its companion provision, § 307 (b)(2), which provides that "[a]ction of the Administrator with respect to which review could have been obtained under [§ 307 (b)(1)] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U. S. C. § 7607 (b)(2) (1976 ed., Supp. II). To preclude a defendant in a civil or criminal enforcement proceeding from attacking the validity of informal action on the part of the Administrator would, in the respondents' view, violate the defendant's due process right to a "reasonable opportunity to be heard and present evidence." *Yakus* v. *United States*, 321 U. S. 414, 433. The short answer to the respondents' argument is that

ents' view that since agency action predicated on neither formal adjudication nor informal rulemaking is apt to be based on a record too scant to permit informed judicial review, the district court is the preferable forum, since the tools of discovery are there available to augment the record, whereas in a court of appeals a time-consuming remand to EPA might be required.

This is an argument to be addressed to Congress, not to this Court. It is not our task to determine which would be the ideal forum for judicial review of the Administrator's decision in this case. See, *e. g.*, Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1 (1975). Rather, we must determine what Congress intended when it vested the courts of appeals with jurisdiction under § 307 (b)(1) to review "any other final action." The language of the statute clearly provides that a decision of the sort at issue here is reviewable in a court of appeals, and nothing in the legislative history points to any different conclusion.[10]

We add only that, as a matter of policy, this conferral of jurisdiction upon the courts of appeals is not wholly irrational. The most obvious advantage of direct review by a court of appeals is the time saved compared to review by a district court, followed by a second review on appeal. It may be seriously questioned whether the overall time lost by court of appeals remands to EPA of those cases in which the

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the validity of § 307 (b)(2) is not at issue here. The constitutional question raised by the respondents must, therefore, await another day.

[10] The dissenting opinions would modify the language of § 307 (b)(1) so as to read either (1) any other final action similar to that under the specifically enumerated provisions other than those added in the Clean Air Act Technical and Conforming Amendments, *post*, at 600–602, or (2) any other final action expressly, but not impliedly, authorized under the sections of the Act not specifically enumerated in § 307 (b)(1), *post*, at 607. But neither the language of the statute nor its legislative history supports either of these proposed readings of § 307 (b)(1).

records are inadequate would exceed the time saved by forgoing in every case initial review in a district court. But whatever the answer to this empirical question, an appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration.[11]

For the reasons stated, we hold that the Court of Appeals erred in dismissing the petition for want of jurisdiction. Accordingly, the judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I continue to have reservations about the constitutionality of the notice and review preclusion provisions of § 307 (b). *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 289 (1978) (POWELL, J., concurring); see *ante*, at 592–593, n. 9. Congress has extended to 60 days the period within which a petition for review may be filed under § 307 (b)(1). But publication in the Federal Register still is unlikely to provide constitutionally adequate notice that a failure to seek immediate review will bar affected parties from challenging the noticed action in a subsequent criminal prosecution. An informal exchange of letters, like those involved in this case, often will provide no greater protection. Although these constitutional difficulties well may counsel a narrow construction of § 307 (b)(1), cf. *Chrysler Corp.* v. *EPA*, 195 U. S. App. D. C. 90, 98–100, 600 F. 2d 904, 912–914 (1979) (parallel provisions of Noise Control Act), no such construction is

[11] Whether the present administrative record in this case is adequate to permit informed judicial review is a question that the Court of Appeals must determine.

possible in this case. As the Court demonstrates, the intention of Congress is clear. Accordingly, I join the opinion of the Court.

MR. JUSTICE BLACKMUN, concurring in the result.

For the reasons stated in my Brother STEVENS' dissent, I accept the Court's conclusion that the Agency's determination in this case constituted "final" action. The opaque language of § 307 (b)(1) and the scant attention it received by Congress, however, leave me in doubt concerning Congress' true intention with respect to the scope of direct appellate review. Like my dissenting Brethren, I find it difficult to believe that Congress would undertake such a massive expansion in the number of Agency actions directly reviewable by the courts of appeals without some palpable indication that it had given thought to the consequences. Nonetheless, I agree with the Court that the dearth of evidence to the contrary makes its broad interpretation of the statute inescapable. On this legislative record, we must leave to Congress, should it be so inclined, the task of introducing some clear limitation on appellate jurisdiction over review of informal Agency determinations like the one now before us.

MR. JUSTICE REHNQUIST, dissenting.

The effort to determine congressional intent here might better be entrusted to a detective than to a judge. The Court rejects the application of the traditional canon of *ejusdem generis* to the phrase "any other final action" on the grounds that (1) there is no uncertainty as to the meaning of that phrase, *ante*, at 588, and (2) at least one of the provisions now included in § 307 (b)(1), 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II)—*i. e.*, § 112 (c), 42 U. S. C. § 7412 (c) (1976 ed., Supp. II)—does not require the Administrator to act after notice and opportunity for comment or hearing, *ante*, at 588. While I agree with the Court that the phrase "any other final action" may not by itself be "ambiguous," I think that what

we know of the matter makes Congress' additions to § 307 (b)(1) in the Clean Air Act Technical and Conforming Amendments of 1977 no less curious than was the incident in the Silver Blaze of the dog that did nothing in the nighttime. If I am correct in this, we must look beyond the language of the phrase "any other final action" in ascertaining congressional intention. The Court did just that in *Chemehuevi Tribe of Indians* v. *FPC*, 420 U. S. 395 (1975).

Before 1977, § 307 (b)(1) granted exclusive jurisdiction to courts of appeals to review only a limited class of actions taken by the Administrator.[1] *District of Columbia* v. *Train*, 175 U. S. App. D. C. 115, 119, 533 F. 2d 1250, 1254 (1976); *Utah Power & Light Co.* v. *EPA*, 180 U. S. App. D. C. 70, 72, 553 F. 2d 215, 217 (1977). The EPA was required to provide for notice and an opportunity for hearing or comment with respect to all such actions. These procedural requirements generally result in the creation of an administrative record

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[1] The section originally provided:

"A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202 (b)(1)), any determination under section 202 (b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111 (d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval. . . ." Pub. L. 91-604, 84 Stat. 1708.

It was inserted by the Senate, S. 4358, 91st Cong., 2d Sess., § 308 (1970), to "specify forums for judicial review of certain actions of the [EPA] Secretary. . . ." H. R. Conf. Rep. No. 91-1783, p. 57 (1970). The House bill did not contain a comparable provision. *Ibid.* In 1974, §§ 119 (c)(2)(A), (B), and (C) and the phrase "regulations thereunder" were added to the list of actions reviewable under § 307 (b)(1). Pub. L. 93-319, 88 Stat. 259.

that is more susceptible of judicial review by courts of appeals than actions such as the one in this case in which no notice and opportunity for comment are required.[2] Indeed, it has been stated: "The requirements that interested persons have an opportunity at least for written comment and that the agency provide a general statement of reasons virtually assure that an appellate court will have a meaningful record to review. While it is true that in many instances informal adjudication also produces an administrative record, the nature and scope of the records vary widely from one type of action to another and cannot provide the same assurance that appellate review will be feasible." Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 57 (1975). Thus the grant of exclusive jurisdiction to courts of appeals in pre-1977 § 307 (b)(1) actions fully comports with the traditional role of appellate courts in reviewing agency decisions that are based on development of factual issues by means of an administrative record.[3]

The revision of § 307 (b)(1) during the Clean Air Act Amendments of 1977, when Congress added the phrase "any other final action," does not in my view support the Court's

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[2] At the Senate debates on S. 4358, Senator Cooper stated that decisions of the EPA made after on-the-record development of "technical and other relevant information necessary to achieve a sound judgment . . . should be reviewable in the court of appeals so that the interests of all parties can be fully protected. With the record developed by the [EPA] Secretary, the court, as an unbiased, independent institution, is the appropriate forum for reviewing such decision and making a judgment as to its quality." 116 Cong. Rec. 33117 (1970).

[3] "Direct appellate review of *formal* administrative adjudications . . . has long been standard practice: because the agency's action is to be judged by the administrative record, there is no need for a trial, and thus no need for prior resort to a district court." Currie, Judicial Review Under Federal Pollution Laws, 62 Iowa L. Rev. 1221, 1232 (1977) (emphasis added). See also Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 5–6 (1975).

construction of that phrase as a major expansion of Congress' original limited grant of exclusive jurisdiction to federal courts of appeals. The amendment added only § 120, 42 U. S. C. § 7420 (1976 ed., Supp. II), to the list of those specifically enumerated in § 307 (b)(1), and it also included the "any other final action" phrase. Pub. L. 95–95, 91 Stat. 776. Section 120 does not depart from the requirement of notice and opportunity for comment or hearing that existed prior to 1977 with respect to the other sections specifically enumerated in § 307 (b)(1). It directs the EPA to give notice and an opportunity for public hearing before adopting the authorized regulations. And in adding the phrase "any other final action" Congress gave no indication whatsoever that it intended to make reviewable in the courts of appeals actions that differed substantially in character from those authorized by § 120 and the other sections listed in § 307 (b)(1). Instead, the limited legislative history on the subject suggests that the amendment was aimed at resolving problems of venue under the section, not at effecting a major jurisdictional shift from the district courts to courts of appeals.[4]

If Congress had done nothing more than enact this amend-

[4] The only discussion of the 1977 addition to the Clean Air Act, § 307 (b)(1), states that the amendment was "intended to clarify some questions relating to *venue* for review of rules or orders under the act." H. R. Rep. No. 95–294, p. 323 (1977) (emphasis added). The House Report noted that "in adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recommendation Section 305.76–4 (A) [41 Fed. Reg. 56768 (1976)], that deals with venue," and that the proposed amendment also "incorporates recommendation D2 of the Administrative Conference on extending the period for petitioning for judicial review in the court of appeals." *Id.*, at 324. It further stated that it did not endorse the remainder of the Administrative Conference's recommendations, *ibid.*, which include a recommendation that proposed expanding the jurisdiction of the courts of appeals by eliminating the exception to review in those courts for regulations adopted under § 202 (b)(1), 42 U. S. C. § 7521 (b)(1) (1976 ed., Supp. II).

ment, I doubt that the Court would find application of the rule of *ejusdem generis* problematic. See *infra*, at 601. The difficulty in ascertaining Congress' intention here arises from the so-called "technical amendments" enacted three months after Congress adopted the Clean Air Act Amendments in 1977. Clean Air Act Technical and Conforming Amendments of 1977, Pub. L. 95–140, 91 Stat. 1404. The amendments purportedly made no substantive changes in the earlier amendments.[5] They nonetheless altered § 307 (b)(1) by specifying four additional sections that would trigger the original jurisdiction of courts of appeals: § 111 (j), 42 U. S. C. § 7411 (j) (1976 ed., Supp. II); § 112 (c), 42 U. S. C. § 7412 (c) (1976 ed., Supp. II); § 113 (d), 42 U. S. C. § 7413 (d) (1976 ed., Supp. II); and § 119, 42 U. S. C. § 7419 (1976 ed., Supp. II). EPA maintains that these additions make no substantive changes because the "any other final action" phrase already included actions under these sections, and under the Court's interpretation of that phrase this would clearly be the case. This view, however, also leads to the conclusion that the technical amendments were a largely meaningless exercise of Congress' legislative authority. But, as previously noted, in presenting the technical amendments, Senator Muskie said they were "*necessary* to correct technical errors or unclear phrases." 123 Cong. Rec. 36252 (1977) (emphasis added); n. 4, *supra*. Thus, the technical amendments, coupled with Senator Muskie's statement in introducing them, present this Court with a paradox in attempting to ascertain Congress' intention: under the Court's interpretation of the phrase "any other final action" the technical amendments, contrary to their advance billing, were entirely unnecessary because the phrase

[5] In a statement explaining the amendments, Senator Muskie stated that "[i]t is not the purpose of these amendments to re-open substantive issues in the Clean Air Act." 123 Cong. Rec. 36252 (1977). Rather, he continued, "[o]nly those amendments that are necessary to correct technical errors or unclear phrases have been retained in the package of amendments that is now before the Senate." *Ibid.*

clearly includes those sections. But if "any other final action" means anything less than the Court's interpretation, then the technical amendments, again contrary to their stated purpose, made important substantive changes to § 307 (b)(1).[6] The Court attempts, partially and unsuccessfully, to address the difficulty here in a footnote, when it acknowledges that under its interpretation the technical amendments were "unnecessary." That response, however, does not answer the question: It merely restates it. The Court adds only the additional observation that "[t]his may be true, but the fact remains that even if Congress had intended the phrase 'any other final action' to be read . . . in accordance with the rule of *ejusdem generis*, there still would have been no necessity to add to the list of specifically enumerated provisions." *Ante*, at 589, n. 6.

In my view, absent any clear indication to the contrary, the statute should not be construed as creating a broad expansion of the jurisdiction of the federal courts of appeals. Such an approach is quite appropriate in this case because the jurisdictional expansion wrought by the Court is thoroughly inconsistent with the traditional role of appellate courts. Indeed, I think it is difficult to believe that Congress would adopt a massive shift in jurisdiction from the district courts to the courts of appeals without any comment whatsoever. The sketchy legislative history here indicates that Congress considered the Administrative Conference's recommendations and that the principal purpose of the 1977 amendment was to effect the change in venue that was recommended by the Administrative Conference. The change would be far less sub-

[6] Section 112 (c) does not make any provision for notice and comment or hearing. And, while §§ 111 (j) and 119 (a) generally provide for notice and hearing, they do not do so in every case. Under § 111 (j), an order *denying* a waiver apparently may be made by the Administrator without formal proceedings, and under § 119 (a), the Administrator apparently may *deny* an application for a primary nonferrous smelter order without providing for notice and hearing.

stantial than the jurisdictional shift that according to the Court Congress adopted *sub silentio*. And the remarks made at the time the technical amendments were adopted, coupled with the nature of the actions reviewable under § 307 (b)(1) prior to that time, are sufficiently perplexing that in my view the technical amendments do not shed any meaningful light on Congress' intention in adding the phrase "any other final action" to § 307 (b)(1). Accordingly, even though they be labeled "technical amendments" I think they are most accurately viewed as subsequent legislative history that is not controlling in interpreting a prior enactment. See *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192, 200, n. 7 (1977). Indeed, to one not acquainted with the significance of the expansion of jurisdiction of courts of appeals urged by the EPA and adopted by the Court, the technical amendments most likely looked like minor additions to § 307 (b)(1). Thus, I think the most sensible way to interpret the phrase "any other final action" is to do so by reference to § 307 (b)(1) at the time that phrase was enacted, rather than at the subsequent time at which the technical amendments were added.

If the phrase "any other final action" is interpreted by reference to § 307 (b)(1) at the time the phrase was added, this case is clearly a proper one in which to apply the rule of *ejusdem generis*. The rule of *ejusdem generis* ordinarily "limits general terms which follow specific ones to matters similar to those specified." *Gooch* v. *United States*, 297 U. S. 124, 128 (1936). It rests on the notion that statutes should be construed so that the "sense of the words . . . best harmonizes with the context and the end in view." *Ibid.* At the time the general language "any other final action" was adopted, notice and opportunity for comments or hearing were required for the actions listed in the sections that preceded it—a requirement that distinguished those sections from the Administrator's action at issue here. Thus under the principle of *ejusdem generis*, the general phrase refers to similar types

of actions. This interpretation offers the most satisfactory explanation for Congress' curious failure to provide any indication that it intended to effect a major jurisdictional change in the manner of reviewing EPA actions such as the one before us, a change that is inconsistent with the traditional role of appellate courts. In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.

MR. JUSTICE STEVENS, dissenting.

From May 1976 through June 1977, respondent PPG Industries, Inc. (PPG), exchanged a series of letters with various officials of the Environmental Protection Agency concerning the applicability of certain federal performance standards to PPG's waste-heat boilers at its Lake Charles, La., plant. PPG took the position that its boilers were not required to meet these standards, first, because construction had begun on them prior to the effective date of the standards and, second, because waste-heat boilers are not within the category of sources to which the standards in question apply.[1]

In April 1977 PPG submitted a formal request, pursuant to 40 CFR § 60.5 (a), for a definitive determination on these issues. Although § 60.5 (a) provides for such determinations only with respect to the first issue raised by PPG,[2] EPA's Regional Administrator apparently rejected both arguments

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[1] PPG also had questions about compliance in the event that the standards were found to apply.

[2] Title 40 CFR § 60.5 (a) (1979) provides:

"When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part."

in her June 1977 response, unequivocally stating that PPG's boilers were subject to the standards in question.

After a few more "clarifying" letters were exchanged, PPG brought two separate petitions for review of EPA's determination, filing in both the District Court for the Western District of Louisiana and the Court of Appeals for the Fifth Circuit. The Fifth Circuit dismissed the petition on the ground that review was properly had, if at all, in the District Court.

There are two issues before us today: first, whether EPA's determination constitutes "final" agency action such that any review is appropriate and, second, if so, whether that review must be had in the Court of Appeals because the determination constituted "any other final action" within the meaning of § 307 (b)(1) of the Clean Air Act, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II). While I accept the Court's holding that the Agency's determination constituted "final" action as that term is ordinarily used under the Administrative Procedure Act, I am not persuaded that Congress intended exclusive review of this type of action in the courts of appeals.

In *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 149–156, this Court set out three tests that informal agency action must meet in order to be considered final agency action that is ripe for judicial review. First, the action must involve an issue that is appropriate for judicial review, such as a purely legal question. Second, it must be a definitive statement of the agency's position and not merely a tentative view or the opinion of a subordinate official. Finally, the party seeking review of the action must be faced with serious hardship if he is not allowed to obtain pre-enforcement review. In *Abbott Laboratories* itself the third requirement was satisfied by the fact that the affected companies either had to expend substantial amounts of money to comply with the regulation or not comply and risk serious criminal and civil penalties.

Although informal advice by agency personnel as to how the agency is likely to react to a particular set of circumstances

will not ordinarily be subject to judicial review under the *Abbott Laboratories* tests, this case would seem to be an exception. As EPA argues, the only issue to be decided is whether certain regulations apply under the facts submitted to the Agency by PPG. Second, the Regional Administrator of EPA herself signed the letter rejecting PPG's position; thus, it appears to be, as the Court suggests, the Agency's "last word" on the issue. *Ante,* at 586.[3] And finally, although the parties have not informed us of the magnitude of PPG's estimated compliance costs, it appears that PPG would have to risk sizeable penalties under 42 U. S. C. §§ 7413 (b), (c), and 7420 (1976 ed., Supp. II) in order to challenge EPA's determination in enforcement proceedings.[4]

Assuming that EPA's letter in this case would constitute "final agency action" under the APA, the second question is whether we are compelled by the language of § 307 (b)(1) to hold that the Court of Appeals had exclusive jurisdiction to

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[3] The Court relies exclusively on this factor, along with the fact that the parties agree that the action is "final." I would not place much reliance on the parties' agreement, however, since they share a common interest in having the threshold jurisdictional question resolved in the affirmative. Thus, it serves PPG's interests to treat EPA's letter as a final action because PPG wants judicial review as soon as possible. It also serves EPA's interests because broadening the category of agency actions that are final and reviewable only in the courts of appeals increases the number of agency actions that cannot be challenged in enforcement proceedings under the Act. See *infra,* at 605.

[4] See *National Automatic Laundry & Cleaning Council* v. *Shultz,* 143 U. S. App. D. C. 274, 281, 443 F. 2d 689, 696 (1971), in which the court held a letter signed by the Wage-Hour Administrator concerning a particular application of the Fair Labor Standards Act to be "final action" in light of the fact that noncompliance with the agency's policy could have led to criminal liability and actions for double damages by affected employees. But see *West Penn Power Co.* v. *Train,* 522 F. 2d 302, 310–311 (CA3 1975), cert. denied, 426 U. S. 947; 522 F. 2d, at 317–319 (Adams, J., dissenting), where the court refused to consider a notice of violation issued pursuant to the Clean Air Act to be final agency action despite the severe penalties that could have attached to future noncompliance.

review that action. As MR. JUSTICE REHNQUIST points out in his dissent, such a construction of the statute will greatly increase the burdens currently borne by the courts of appeals, both in terms of numbers of cases and difficulty of issues presented.[5] *Ante*, at 596–597, 600–601. In my view, it will also distort the concept of final agency action by giving EPA virtually unlimited discretion to transform its informal advice into final agency action subject to court of appeals review.

Under § 307 (b)(2) of the Clean Air Act, any agency action that was reviewable in the courts of appeals cannot be challenged in an enforcement proceeding, whether or not review was actually sought.[6] Under § 307 (b)(1), a petition for review must be filed within 60 days of the publication of the agency action in the Federal Register. Although EPA apparently did not publish letters like its letter to PPG in the Federal Register prior to the Clean Air Act Amendments of 1977, it is now embarking on a program to do so.[7] Because

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[5] Whether or not the record in this case was sufficiently developed for purposes of court of appeals' review (an issue on which the parties differ), it is clear that there will be many cases involving informal EPA action in which the "record" on which the Agency relied in making its determination will be minimal.

[6] Section 307 (b)(2) of the Clean Air Act provides:

"Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement."

[7] In EPA's brief in the Court of Appeals, it took the position that, by adding "any other final action" to § 307 (b)(1), Congress intended to require the Agency to give notice in the Federal Register of each and every "final action" it takes, contrary to its prior practice. Although the Agency noted that it had not yet begun complying with this obligation, it stated that it intended to begin publication in the near future of all final agency actions taken since the 1977 amendments. Brief for Respondents in No. 77-2989 (CA5), pp. 27–29. EPA's interpretation of the Federal Register clause as a requirement that notice of final determinations be given seems backwards to me. I think a more plausible interpretation of the statute is that Congress intended the term "final agency action" to

publication may give the Agency the benefit of the preclusive effect of § 307 (b)(2), it has every incentive to notice a wide range of actions in the Federal Register.

Once notice of an action has been published in the Federal Register, it would be difficult to argue that it was not "final" agency action. Most of the determinations would, like this one, concern applications of particular regulations to undisputed fact situations. Second, the very fact that the Agency had published its position would indicate that it was a definitive statement of agency policy. And finally, the requirement that an aggrieved person show some hardship entitling him to pre-enforcement review would also seem to be satisfied by mere publication, since the failure to raise the issue might well foreclose future review entirely.[8]

I find it difficult to believe that Congress intended this highly undesirable result. Although I do not share MR. JUSTICE REHNQUIST's interpretation of the statute, I would construe it as drawing a line short of allowing EPA complete discretion to turn anything it chooses into final action reviewable only in the courts of appeals.

Section 307 (b)(1) mandates exclusive review in the courts of appeals of the Administrator's actions under certain specific subsections of the Act. Those subsections contain specific grants of authority to the Administrator to make certain determinations. Thus, §§ 110 and 111 (d), 42 U. S. C. §§ 7410 and 7411 (d) (1976 ed., Supp. II), empower the Administrator to approve state implementation plans; §§ 111 (j), 112 (c), 113 (d), and 119, 42 U. S. C. §§ 7411 (j), 7412 (c), 7413 (d),

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refer only to the types of actions that EPA was accustomed to publishing in the Federal Register prior to the 1977 amendments.

[8] The hardship determination, of course, becomes circular, since there is no preclusion unless there is "final" agency action and no finality unless there is some hardship in not according pre-enforcement review. Under these circumstances, the courts are likely to emulate the Court's approach in this case, ignoring the hardship component entirely and making reviewable any action that constitutes a definitive statement of the Agency's position.

and 7419 (1976 ed., Supp. II), empower the Administrator to grant (and by necessary implication to deny) waivers to companies that are unable to comply with the applicable standards; and § 120, 42 U. S. C. § 7420 (1976 ed., Supp. II), sets up a procedure through which the Administrator is to assess noncompliance penalties, after notice and hearing on the record. Each of these types of agency action has an immediate impact on the legal rights of the affected party.

By contrast, agency advice as to whether or not particular sources are subject to previously promulgated regulations does not, in itself, change any party's legal status; nor is there anything in the statute that specifically requires or permits the Administrator to give such advice. This does not mean that it is beyond the Administrator's power to do so or to set up his own procedures, as he has done in 40 CFR § 60.5 (a) (1979), for giving advice in a formalized manner. But I do not believe Congress intended the review provisions of the statute to cover this type of "agency action" as well as those types specifically contemplated by the statute. In making reviewable "any other final action of the Administrator under this chapter," Congress must have been thinking of actions it had specifically directed or authorized the Administrator to take under sections of the Act not specifically enumerated in § 307 (b)(1). This interpretation is consistent with both an *ejusdem generis* construction of the statute and its plain language. It is also supported by Congress' apparent belief that it was extending court of appeals review only to the types of actions that EPA had been accustomed to publishing in the Federal Register. See n. 7, *supra*.

Accordingly, I respectfully dissent.

ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 79-48. Argued March 24, 1980—Decided May 27, 1980

Held: The Buy Indian Act, which permits the Secretary of the Interior to purchase "the products of Indian industry . . . in open market," does not authorize the Department of the Interior's Bureau of Indian Affairs (BIA) to enter into road construction contracts with Indian-owned companies without first advertising for bids pursuant to Title III of the Federal Property and Administrative Services Act of 1949 (FPASA). There is no such authority even if the Buy Indian Act's language "the products of Indian industry" could be construed to embrace road construction, since, while negotiated procurements "otherwise authorized by law" are one of the specified exceptions to Title III's broad directive in 41 U. S. C. § 252 (c) that all procurement by the covered executive agencies (including the BIA) proceed through advertising, such exception is omitted from the list of the exceptions specified in § 252 (e) to the requirement that § 252 (c) not be construed to permit any road construction contract to be negotiated without advertising. From this omission only one inference can be drawn: Congress meant to bar the negotiation of road construction projects under the authority of laws like the Buy Indian Act. Pp. 612-619.

591 F. 2d 554, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

Andrew J. Levander argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Claiborne, Robert L. Klarquist,* and *Larry A. Boggs.*

D. D. Hayes argued the cause and filed a brief for respondent.*

**Reid Peyton Chambers, Arthur Lazarus, Jr.,* and *Richard A. Baenen* filed a brief for the Association on American Indian Affairs, Inc., et al. as *amici curiae* urging reversal.

MR. JUSTICE STEWART delivered the opinion of the Court.

The Buy Indian Act, 35 Stat. 71, as amended, 25 U. S. C. § 47, directs the Secretary of the Interior to employ Indian labor "[s]o far as may be practicable," and permits him to purchase "the products of Indian industry . . . in open market." [1] The question presented in this case is whether the Bureau of Indian Affairs (BIA) of the Department of the Interior [2] may, on the authority of this legislation, enter into road construction contracts with Indian-owned companies without first advertising for bids pursuant to Title III of the Federal Property and Administrative Services Act of 1949 (FPASA), 63 Stat. 393, as amended, 41 U. S. C. §§ 251–260.

I

In 1976, the BIA formally adopted the procurement policy that "all [BIA] purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent." [3] To effectuate this objective, the BIA announced that in every procurement situation it would consider dealing with non-Indian contractors only after it had determined that there were "no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement." [4]

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[1] Title 25 U. S. C. § 47 provides in full:

"So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior."

[2] The Secretary of the Interior has delegated his responsibilities and powers under the Act to the Commissioner of the BIA.

[3] 20 BIAM Bull. 1 (Mar. 3, 1976). See also 25 CFR § 162.5a (1978); 41 CFR § 14H–3.215–70 (1977). The Bulletin defined "Indian contractor" as a legal entity that is 100% Indian owned and controlled. An "Indian" was defined as a member of an Indian tribe or as a person otherwise considered to be an Indian by the tribe with which affiliation is claimed.

[4] The Bulletin admonished that, in all events, the contract price must be "fair and reasonable."

In early 1977, the BIA invited three Indian-owned construction companies to submit bids for the repair and improvement of a 5-mile segment of road in Pushmataha County, Okla. The road, commonly called the Honobia Road, is located within an area subject to BIA jurisdiction. The respondent, a non-Indian corporation engaged as a general contractor in roadbuilding and other forms of heavy construction, was not afforded an opportunity to bid.[5] On May 25, 1977, BIA awarded the contract to Indian Nations Construction Co., a corporation owned and controlled exclusively by Indians and the only Indian-owned company to have bid on the project. The final negotiated contract price amounted to approximately $1.2 million.[6]

The respondent then filed the present suit in the United States District Court for the Eastern District of Oklahoma, naming as defendants the Secretary of the Interior, the Department of the Interior, BIA, and the BIA contracting officer on the Honobia Road project (petitioners here). The respondent alleged that the petitioners were required by § 3709 of the Revised Statutes, 41 U. S. C. § 5, and Title III of the FPASA to advertise publicly for bids on the Honobia Road project. The respondent further claimed that the actions of the petitioners had denied it due process and equal protection in contravention of the Fifth Amendment of the United States Constitution. As relief, the respondent re-

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[5] At the time, the respondent was on the list of available contractors maintained by the BIA. Previously, the respondent had competitively bid on and been awarded the contract covering another five miles of the Honobia Road.

In procurement parlance, contracts for which bids are publicly invited in advance are said to be let pursuant to "advertising." See 41 U. S. C. § 253; 41 CFR §§ 1-2.101, 1-2.203-1, 1-2.203-2 (1979). All other contracts are "negotiated." See 41 U. S. C. §§ 252 (c), 254; 41 CFR § 1-1.301-3 (1979).

[6] The BIA's area road engineer had earlier estimated that the job would cost $963,117.48.

quested the District Court to set aside the Honobia Road contract and to enjoin the petitioners from engaging in the unadvertised negotiation of contracts on the purported authority of the Buy Indian Act.

After the completion of discovery, the District Court granted summary judgment to the respondent. 451 F. Supp. 1102. The court concluded that the procedure followed by the petitioners in awarding the Honobia Road project to the Indian Nations Construction Co. violated the advertising requirements of the FPASA, in particular 41 U. S. C. §§ 252 (e) and 253. 451 F. Supp., at 1106. The court rejected the Secretary's contrary administrative construction as inconsistent with the plain language of the FPASA. *Id.*, at 1106–1108. Deciding in favor of the respondent on these statutory grounds, the District Court found it unnecessary to reach the respondent's alternative arguments under the Constitution. *Id.*, at 1108. The court thereupon declared the road construction contract that had been entered into between the petitioners and the Indian Nations Construction Co. to be null and void, and permanently enjoined the petitioners from circumventing the advertising requirements of 41 U. S. C. § 253 in connection with the remainder of the Honobia Road project and future road construction projects. 451 F. Supp., at 1112.[7]

A divided panel of the Court of Appeals for the Tenth Circuit affirmed the judgment. 591 F. 2d 554. Relying in large part on the analysis of the District Court, the Court of Appeals held that, whatever might arguably be the breadth of the Buy Indian Act standing alone, it had been pre-empted by the advertising requirements of the FPASA with respect

[7] The court denied the respondent's request that Indian Nations Construction Co. be made to refund the amounts it had been paid for work already performed on the Honobia Road project before the court's entry of judgment. 451 F. Supp., at 1109, 1112. In this connection, the District Court noted that 9.7% of the construction contract had been completed and paid for at the time of its decision. *Id.*, at 1109.

to the procurement of road construction projects. *Id.*, at 557–559. Alternatively, the Court of Appeals observed that it would "require a considerable 'stretch of the imagination' to conclude that the Congress intended the Buy-Indian Act to apply to road construction projects." *Id.*, at 560. The appellate court believed, in short, that the Act's preference for Indian "products" could not easily be read to include the performance of a roadway construction contract by an Indian-owned firm. *Id.*, at 562. In response to the petitioners' contention that the Buy Indian Act should be construed liberally to effectuate its remedial purpose, the court observed that "a primary, significant remedial feature of the advertisement and competitive bidding requirements of the [FPASA] is to obtain the best and lowest bid for the benefit of the American taxpayers in 'high cost' construction categories." *Ibid.* (emphasis deleted). We granted certiorari, 444 U. S. 962, to decide a question of importance in the proper exercise by the BIA of its procurement responsibilities.

II

The Buy Indian Act was enacted in 1910 as part of legislation that subjected the purchase of Indian supplies by the Department of the Interior to the strictures of § 3709 of the Revised Statutes.[8] Section 3709, which had been in existence

[8] The Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861, provided:

"That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed."

The origins of this legislation lay in a series of Appropriations Acts concerning the Indian Department of the Department of the Interior. Each of these annual Acts contained a provision whose language was similar to that of the present Buy Indian Act. See, *e. g.*, Act of Apr. 30, 1908, ch. 153, 35 Stat. 70; Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015.

since 1861,[9] required agencies subject to its provisions to advertise for bids on all but a few Government procurements.[10] The purpose of the Buy Indian Act was clear. Purchases by the Department of the Interior of "the products of Indian industry" were to be exempt from any requirement of advertising for bids imposed by § 3709 of the Revised Statutes.[11]

The legislation of which the Buy Indian Act was a part was amended from time to time between 1910 and 1965, but none of these changes affected the substance of what had been enacted in 1910. The BIA, as was true of most other departments of the Government, continued to operate under a general mandate that contracts for supplies and services be let in conformity with § 3709 of the Revised Statutes.[12] Sec-

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[9] See Act of Mar. 2, 1861, ch. 84, § 10, 12 Stat. 220.

[10] In 1910, § 3709 of the Revised Statutes provided in pertinent part: "All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

[11] The structure of § 23 of the Act of June 25, 1910, evidences this intent. See n. 8, *supra*. So does the Act's legislative history. The House Report explained that "[w]ith the exceptions noted in the proviso," *i. e.*, the Buy Indian Act, § 23 "will bring the Indian Service, like all other branches of the public service, under the provisions of section 3709 of the Revised Statutes. . . ." H. R. Rep. No. 1135, 61st Cong., 2d Sess., 12 (1910). See also 45 Cong. Rec. 6097 (1910) (Rep. Burke).

[12] In 1926, § 23 of the 1910 Act was split into two parts for codification purposes. The language that required the BIA to adhere to the advertising rules contained in § 3709 of the Revised Statutes was placed in 25 U. S. C. § 93. The proviso respecting the purchase of Indian goods was located in 25 U. S. C. § 47. No contemporaneous suggestion was made that this separation was intended to affect the substance of either segment of the original Act.

In 1940, a further change occurred. As part of an effort to eliminate

tion 3709, in turn, was recodified (41 U. S. C. § 5) and amended, but its basic mandate remained the same.[13] Government procurement was to proceed through advertising for bids unless excepted by § 3709 or "otherwise provided" by laws such as the Buy Indian Act.[14]

In 1965, the law affecting BIA procurement was substantially modified. The regime of detailed contracting requirements contained in Title III of the FPASA, theretofore applicable only to the General Services Administration and to certain special procurements,[15] was extended to cover the purchasing procedures of the BIA and most other executive

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redundant provisions respecting the operation of federal agencies, 25 U. S. C. § 93 was repealed and 41 U. S. C. § 6a (g) enacted in its place. See Act of Oct. 10, 1940, ch. 851, §§ 2 (g), 4 (a), 54 Stat. 1110, 1111, 1112. This rearrangement made "no changes in existing law." H. R. Rep. No. 2647, 76th Cong., 3d Sess., 1 (1940). See S. Rep. No. 2135, 76th Cong., 3d Sess., 2 (1940). Then, in 1951, 41 U. S. C. § 6a (g) was repealed. See Act of Oct. 31, 1951, ch. 654, § 1 (107), 65 Stat. 705. Obsolescence seems to have led to the demise of 25 U. S. C. § 93 and 41 U. S. C. § 6a (g). See H. R. Rep. No. 1105, 82d Cong., 1st Sess., 2–3 (1951). By 1951, § 3709 of the Revised Statutes had been amended to require advertising in all cases except where small purchases were involved, where a specific exemption in § 3709 applied, or where "otherwise provided in . . . other law." See 41 U. S. C. § 5 (1946 ed.).

[13] In 1964, 41 U. S. C. § 5 (1964 ed.) read in pertinent part:

"Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $2,500, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis."

[14] Since its codification in 1926 in 25 U. S. C. § 47, the Buy Indian Act has undergone no change in phraseology.

[15] See 41 U. S. C. § 252 (a) (1964 ed.).

agencies.[16] See 41 U. S. C. § 252 (a); 40 U. S. C. §§ 472 (a), 474. For covered agencies, one consequence of this legislation was to substitute the advertising requirements set out in Title III of the FPASA for those contained in § 3709 of the Revised Statutes. See 41 U. S. C. § 260; S. Rep. No. 274, 89th Cong., 1st Sess., 1, 5 (1965); H. R. Rep. No. 1166, 89th Cong., 1st Sess., 7, 9 (1965); 111 Cong. Rec. 27198 (1965) (Rep. Brooks).

Under Title III of the FPASA, the BIA must now adhere to the broad statutory mandate that "[a]ll purchases and contracts for property and services shall be made by advertising. . . ." 41 U. S. C. § 252 (c). From this directive, the statute specifically excepts only 15 types of procurements, the 15th covering situations where negotiated procurements are "otherwise authorized by law. . . ." § 252 (c)(15) (subsection (c)(15)).

The Buy Indian Act is clearly a "law" within the contemplation of subsection (c)(15). As § 41 U. S. C. 260 expressly states: "Any provision of law which authorizes an executive agency . . . to procure any property or services without advertising or without regard to [§ 3709 of the Revised Statutes, 41 U. S. C. § 5] shall be construed to authorize the procurement of such property or services pursuant to section 252 (c)(15) of this title without regard to the advertising requirements of . . . this title." See also S. Rep. No. 274, *supra*, at 5; H. R. Rep. No. 1166, *supra*, at 8. As noted above, the Buy Indian Act has from its inception authorized the BIA to "purchas[e] the products of Indian industry" without regard to the advertising requirements of § 3709 of the Revised Statutes.

Relying on subsection (c)(15) and § 260, the petitioners argue that the BIA proceeded correctly in awarding the Honobia Road contract to the Indian Nations Construction Co. without prior public advertising for bids. They assert that

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[16] 79 Stat. 1303.

a road constructed or repaired by an Indian-owned corporation is a "product of Indian industry" within the meaning of the Buy Indian Act and, accordingly, that the Honobia Road project was exempt from the FPASA's advertising rules by operation of subsection (c)(15).

It is fairly debatable, we think, simply as a matter of language, whether a road constructed or repaired by an Indian-owned enterprise is a "product of Indian industry" within the meaning of the Buy Indian Act. But even if that Act could in isolation be construed to embrace road construction or repair, the petitioners' argument must still be rejected because of another provision of Title III of the FPASA expressly relating to contracts of the sort at issue here. Title 41 U. S. C. § 252 (e) (subsection (e)) states that § 252 (c) "shall not be construed to . . . permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising . . . , unless . . . negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section." [17] Not contained in this list of exceptions is subsection (c)(15). From this omission only one inference can be drawn: Congress meant to bar the negotiation of road construction and repair projects under the authority of laws like the Buy Indian Act. Where Congress explicitly enumerates certain exceptions to a

[17] Title 41 U. S. C. § 252 (e) provides in full:

"This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section."

No contention has been made that paragraphs (1), (2), (3), (11), (12), or (14) of subsection (c) authorized negotiation of the Honobia Road project. As to paragraph (10), see n. 20, *infra*.

general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. See *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 533.[18]

In an attempt to avoid the obvious import of subsection (e), the petitioners argue that the subsection does not apply at all to cases in which the Buy Indian Act is involved. The petitioners reason that subsection (e) is concerned solely with procurement contracts whose negotiation is "permitted" by § 252, and that the negotiation authority afforded by the Buy Indian Act does not fit this description because that Act is a statute which of its own force operates independently of the FPASA.

We read the pertinent statutes differently. In the absence of subsection (c)(15), the Buy Indian Act could independently confer no authority on the BIA to avoid public advertising for competitive bids. Title 40 U. S. C. § 474 provides that "[t]he authority conferred by [the FPASA] shall be in addition and *paramount* to *any* authority conferred by any other law and shall not be subject to the provisions of *any* law inconsistent herewith. . . ." (Emphasis supplied.) In view of § 252's broad directive that all procurement proceed

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[18] Nothing in the legislative history of the 1965 amendments to the FPASA points in a different direction than does the plain language of the statute. The petitioners cite the following passage found in several of the congressional Committee Reports that accompanied the 1949 version of the FPASA:

"For clarity [subsection (e)] provides that [41 U. S. C. § 252] does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items." H. R. Rep. No. 670, 81st Cong., 1st Sess., pt. 1, p. 23 (1949); S. Rep. No. 338, 81st Cong., 1st Sess., 20 (1949); S. Rep. No. 475, 81st Cong., 1st Sess., 25 (1949).

This statement, however, sheds no light on the proper disposition of the instant case. It referred to the provisions of the FPASA at a time when that legislation governed no more than the General Services Administration and a few special procurements.

through advertising, the Buy Indian Act's contrary mandate would not have survived the 1965 amendments to the FPASA had Title III of the FPASA not contained subsection (c)(15). In short, § 252 (c) "permits" negotiation pursuant to the Buy Indian Act and, therefore, such negotiation is limited by the special rule applicable to road construction contained in subsection (e).[19]

We are, nonetheless, urged to disregard the plain meaning of subsection (e) because of the axiom that repeals by implication of longstanding statutory provisions are not favored. See *Universal Interpretive Shuttle Corp.* v. *Washington Metropolitan Area Transit Comm'n*, 393 U. S. 186, 193. The maxim is said to be particularly compelling here because the older statute is "remedial" legislation for the benefit of Indians. See *Morton* v. *Mancari*, 417 U. S. 535, 549–551. The 1965 amendments to the FPASA did not, however, "repeal" the Buy Indian Act. With the exception of the limited class of contracts enumerated in subsection (e), the FPASA did not in any manner displace the provisions of the Buy Indian Act. Moreover, "[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a

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[19] Alternatively, the petitioners contend that subsection (e) does not govern here because of § 252 (a)(2). That provision states that §§ 251 through 260 of Title 41 "d[o] not apply . . . when [those sections are] made inapplicable pursuant to section 474 of title 40 or any other law. . . ." According to the petitioners, the Buy Indian Act is an "other law" within the intendment of § 252 (a)(2).

We disagree, reading subsection (a)(2) to refer exclusively to statutory provisions that—unlike the Buy Indian Act—in express terms exempt procurements from §§ 251 through 260 of Title 41 or from the FPASA in its entirety. Any broader reading of subsection (a)(2) would render subsection (c)(15) superfluous and would also substantially undermine Congress' desire that the requirements of § 254 apply "to contracts negotiated by executive agencies under *any* law, not only title III." S. Rep. No. 274, 89th Cong., 1st Sess., 2 (1965); H. R. Rep. No. 1166, 89th Cong., 1st Sess., 2 (1965). (Emphasis added.) See *id.*, at 2–3.

clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari, supra,* at 551. And, although the "rule by which legal ambiguities are resolved to the benefit of the Indians" is to be given "the broadest possible scope," "[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent." *DeCoteau* v. *District County Court,* 420 U. S. 425, 447.

For the reasons stated, the judgment of the Court of Appeals is affirmed.[20]

It is so ordered.

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[20] The petitioners have requested that, if their basic arguments are rejected, this case, nonetheless, be remanded to the Court of Appeals for further consideration in light of 41 U S. C. § 252 (c)(10), which authorizes the negotiation of Government contracts "for property or services for which it is impracticable to secure competition." The petitioners, however, did not rely on this statutory provision in defending this lawsuit in the District Court, and the Court of Appeals did not consider it. Our affirmance of the judgment of the Court of Appeals does not preclude the petitioners from seeking relief from the outstanding injunction on this ground or any other. See *NLRB* v. *Sears, Roebuck & Co.,* 421 U. S. 132, 165, n. 30. See also Fed. Rule Civ. Proc. 60 (b).

UNITED STATES *v.* HAVENS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-305. Argued March 19, 1980—Decided May 27, 1980

After respondent and another man (McLeroth) arrived at the Miami Airport on a flight from Peru, a customs officer searched McLeroth and found cocaine sewed into makeshift pockets in a T-shirt he was wearing. When McLeroth implicated respondent, respondent was arrested and his luggage was searched without a warrant. A T-shirt from which pieces had been cut that matched the pieces sewn to McLeroth's T-shirt was found in the luggage and seized. The seized T-shirt was suppressed prior to respondent's trial on federal drug charges. At the trial, McLeroth, who had pleaded guilty, testified against respondent, asserting that respondent had supplied him with the altered T-shirt and had sewed the makeshift pockets shut. Respondent, taking the stand in his own defense, acknowledged, in his direct testimony, McLeroth's prior testimony that the cocaine was "taped or draped around his body" but denied that he had "ever engage[d] in that kind of activity" with McLeroth. On cross-examination, the Government called attention to these answers and then asked whether respondent had anything to do with sewing the makeshift pockets on McLeroth's T-shirt. Respondent denied that he had. And when the Government asked him whether he had a T-shirt with pieces missing in his luggage and whether the seized T-shirt was in his luggage, respondent replied to both questions: "Not to my knowledge." After rebuttal testimony for the Government, the seized T-shirt was admitted into evidence over objection, the jury being instructed that the rebuttal evidence was to be considered only for impeaching respondent's credibility. Respondent's conviction was reversed by the Court of Appeals, which held that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination.

Held: A defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the Government, albeit by evidence that has been illegally obtained and is inadmissible as substantive evidence of guilt. Cf. *Harris* v. *New York*, 401 U. S. 222; *Oregon* v. *Hass*, 420 U. S. 714. Here, respondent's testimony on direct examination could easily be understood as a denial of any connection with

McLeroth's T-shirt and as a contradiction of McLeroth's testimony, and the Government on cross-examination reasonably called attention to respondent's answers on direct and then asked whether he had anything to do with sewing the pockets on McLeroth's T-shirt. This was cross-examination growing out of respondent's direct testimony, and the ensuing impeachment did not violate his constitutional rights. Pp. 624–628.

592 F. 2d 848, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in Part I of which STEWART and STEVENS, JJ., joined, *post*, p. 629.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General McCree* and *Assistant Attorney General Heymann*.

William C. Lee argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

The petition for certiorari filed by the United States in this criminal case presented a single question: whether evidence suppressed as the fruit of an unlawful search and seizure may nevertheless be used to impeach a defendant's false trial testimony, given in response to proper cross-examination, where the evidence does not squarely contradict the defendant's testimony on direct examination. We issued the writ, 444 U. S. 962 (1979).

I

Respondent was convicted of importing, conspiring to import, and intentionally possessing a controlled substance, cocaine. According to the evidence at his trial, Havens and John McLeroth, both attorneys from Ft. Wayne, Ind., boarded a flight from Lima, Peru, to Miami, Fla. In Miami, a customs officer searched McLeroth and found cocaine sewed into makeshift pockets in a T-shirt he was wearing under his outer

clothing. McLeroth implicated respondent, who had previously cleared customs and who was then arrested. His luggage was seized and searched without a warrant. The officers found no drugs but seized a T-shirt from which pieces had been cut that matched the pieces that had been sewn to McLeroth's T-shirt. The T-shirt and other evidence seized in the course of the search were suppressed on motion prior to trial.

Both men were charged in a three-count indictment, but McLeroth pleaded guilty to one count and testified against Havens. Among other things, he asserted that Havens had supplied him with the altered T-shirt and had sewed the makeshift pockets shut. Havens took the stand in his own defense and denied involvement in smuggling cocaine. His direct testimony included the following:

> "Q. And you heard Mr. McLeroth testify earlier as to something to the effect that this material was taped or draped around his body and so on, you heard that testimony?
>
> "A. Yes, I did.
>
> "Q. Did you ever engage in that kind of activity with Mr. McLeroth and Augusto or Mr. McLeroth and anyone else on that fourth visit to Lima, Peru?
>
> "A. I did not." App. 34.

On cross-examination, Havens testified as follows:

> "Q. Now, on direct examination, sir, you testified that on the fourth trip you had absolutely nothing to do with the wrapping of any bandages or tee shirts or anything involving Mr. McLeroth; is that correct?
>
> "A. I don't—I said I had nothing to do with any wrapping or bandages or anything, yes. I had nothing to do with anything with McLeroth in connection with this cocaine matter.
>
> . . . . .
>
> "Q. And your testimony is that you had nothing to

do with the sewing of the cotton swatches to make pockets on that tee shirt?

"A. Absolutely not.

"Q. Sir, when you came through Customs, the Miami International Airport, on October 2, 1977, did you have in your suitcase Size 38–40 medium tee shirts?" *Id.*, at 35.

An objection to the latter question was overruled and questioning continued:

"Q. On that day, sir, did you have in your luggage a Size 38–40 medium man's tee shirt with swatches of clothing missing from the tail of that tee shirt?

"A. Not to my knowledge.

. . . . . .

"Q. Mr. Havens, I'm going to hand you what is Government's Exhibit 9 for identification and ask you if this tee shirt was in your luggage on October 2nd, 1975 [*sic*]?

"A. Not to my knowledge. No." *Id.*, at 46.

Respondent Havens also denied having told a Government agent that the T-shirts found in his luggage belonged to McLeroth.

On rebuttal, a Government agent testified that Exhibit 9 had been found in respondent's suitcase and that Havens claimed the T-shirts found in his bag, including Exhibit 9, belonged to McLeroth. Over objection, the T-shirt was then admitted into evidence, the jury being instructed that the rebuttal evidence should be considered only for impeaching Havens' credibility.

The Court of Appeals reversed, relying on *Agnello* v. *United States*, 269 U. S. 20 (1925), and *Walder* v. *United States*, 347 U. S. 62 (1954). The court held that illegally seized evidence may be used for impeachment only if the evidence contradicts a particular statement made by a defendant in the course of his direct examination. 592 F. 2d 848 (CA5 1979). We reverse.

II

In *Agnello* v. *United States, supra,* a defendant charged with conspiracy to sell a package of cocaine testified on direct examination that he had possessed the packages involved but did not know what was in them. On cross-examination, he denied ever having seen narcotics and ever having seen a can of cocaine which was exhibited to him and which had been illegally seized from his apartment. The can of cocaine was permitted into evidence on rebuttal. Agnello was convicted and his conviction was affirmed by the Court of Appeals. This Court reversed, holding that the Fourth Amendment required exclusion of the evidence. The Court pointed out that "[i]n his direct examination, Agnello was not asked and did not testify concerning the can of cocaine" and "did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained by the search." 269 U. S., at 35. The Court also said, quoting from *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392 (1920), that the exclusionary rule not only commands that illegally seized evidence "shall not be used before the Court but that it shall not be used at all." 269 U. S., at 35.

The latter statement has been rejected in our later cases, however, and *Agnello* otherwise limited. In *Walder* v. *United States, supra,* the use of evidence obtained in an illegal search and inadmissible in the Government's case in chief was admitted to impeach the direct testimony of the defendant. This Court approved, saying that it would pervert the rule of *Weeks* v. *United States,* 232 U. S. 383 (1914), to hold otherwise. Similarly, in *Harris* v. *New York,* 401 U. S. 222 (1971), and *Oregon* v. *Hass,* 420 U. S. 714 (1975), statements taken in violation of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and unusable by the prosecution as part of its own case, were held admissible to impeach statements made by the defendant in the course of his direct testimony. *Harris*

also made clear that the permitted impeachment by otherwise inadmissible evidence is not limited to collateral matters. 401 U. S., at 225.

These cases were understood by the Court of Appeals to hold that tainted evidence, inadmissible when offered as part of the Government's main case, may not be used as rebuttal evidence to impeach a defendant's credibility unless the evidence is offered to contradict a particular statement made by a defendant during his direct examination; a statement made for the first time on cross-examination may not be so impeached. This approach required the exclusion of the T-shirt taken from Havens' luggage because, as the Court of Appeals read the record, Havens was asked nothing on his direct testimony about the incriminating T-shirt or about the contents of his luggage; the testimony about the T-shirt, which the Government desired to impeach first appeared on cross-examination, not on direct.

It is true that *Agnello* involved the impeachment of testimony first brought out on cross-examination and that in *Walder, Harris,* and *Hass,* the testimony impeached was given by the defendant while testifying on direct examination. In our view, however, a flat rule permitting only statements on direct examination to be impeached misapprehends the underlying rationale of *Walder, Harris,* and *Hass.* These cases repudiated the statement in *Agnello* that no use at all may be made of illegally obtained evidence. Furthermore, in *Walder,* the Court said that in *Agnello,* the Government had "smuggled in" the impeaching opportunity in the course of cross-examination. The Court also relied on the statement in *Agnello, supra,* at 35, that Agnello had done nothing "to justify cross-examination in respect of the evidence claimed to have been obtained by the search." The implication of *Walder* is that *Agnello* was a case of cross-examination having too tenuous a connection with any subject opened upon direct examination to permit impeachment by tainted evidence.

In reversing the District Court in the case before us, the Court of Appeals did not stop to consider how closely the cross-examination about the T-shirt and the luggage was connected with matters gone into in direct examination. If these questions would have been suggested to a reasonably competent cross-examiner by Havens' direct testimony, they were not "smuggled in"; and forbidding the Government to impeach the answers to these questions by using contrary and reliable evidence in its possession fails to take account of our cases, particularly *Harris* and *Hass*. In both cases, the Court stressed the importance of arriving at the truth in criminal trials, as well as the defendant's obligation to speak the truth in response to proper questions. We rejected the notion that the defendant's constitutional shield against having illegally seized evidence used against him could be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U. S., at 226. See also *Oregon* v. *Hass*, *supra*, at 722, 723. Both cases also held that the deterrent function of the rules excluding unconstitutionally obtained evidence is sufficiently served by denying its use to the government on its direct case. It was only a "speculative possibility" that also making it unavailable to the government for otherwise proper impeachment would contribute substantially in this respect. *Harris* v. *New York*, *supra*, at 225. *Oregon* v. *Hass*, *supra*, at 723.

Neither *Harris* nor *Hass* involved the impeachment of assertedly false testimony first given on cross-examination, but the reasoning of those cases controls this one. There is no gainsaying that arriving at the truth is a fundamental goal of our legal system. *Oregon* v. *Hass*, *supra*, at 722. We have repeatedly insisted that when defendants testify, they must testify truthfully or suffer the consequences. This is true even though a defendant is compelled to testify against his will. *Bryson* v. *United States*, 396 U. S. 64, 72 (1969); *United States* v. *Knox*, 396 U. S. 77 (1969). It is essential,

therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth. The defendant's obligation to testify truthfully is fully binding on him when he is cross-examined. His privilege against self-incrimination does not shield him from proper questioning. *Brown* v. *United States*, 356 U. S. 148, 154–155 (1958). He would unquestionably be subject to a perjury prosecution if he knowingly lies on cross-examination. Cf. *United States* v. *Apfelbaum*, 445 U. S. 115 (1980); *Bryson* v. *United States*, *supra*; *United States* v. *Knox*, *supra*; *United States* v. *Wong*, 431 U. S. 174 (1977). In terms of impeaching a defendant's seemingly false statements with his prior inconsistent utterances or with other reliable evidence available to the government, we see no difference of constitutional magnitude between the defendant's statements on direct examination and his answers to questions put to him on cross-examination that are plainly within the scope of the defendant's direct examination. Without this opportunity, the normal function of cross-examination would be severely impeded.

We also think that the policies of the exclusionary rule no more bar impeachment here than they did in *Walder*, *Harris*, and *Hass*. In those cases, the ends of the exclusionary rules were thought adequately implemented by denying the government the use of the challenged evidence to make out its case in chief. The incremental furthering of those ends by forbidding impeachment of the defendant who testifies was deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial. We reaffirm this assessment of the competing interests, and hold that a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeach-

ment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.

In arriving at its judgment, the Court of Appeals noted that in response to defense counsel's objection to the impeaching evidence on the ground that the matter had not been "covered on direct," the trial court had remarked that "[i]t does not have to be covered on direct." The Court of Appeals thought this was error since in its view illegally seized evidence could be used only to impeach a statement made on direct examination. As we have indicated, we hold a contrary view; and we do not understand the District Court to have indicated that the Government's question, the answer to which is sought to be impeached, need not be proper cross-examination in the first instance. The Court of Appeals did not suggest that either the cross-examination or the impeachment of Havens would have been improper absent the use of illegally seized evidence, and we cannot accept respondent's suggestions that because of the illegal search and seizure, the Government's questions about the T-shirt were improper cross-examination. McLeroth testified that Havens had assisted him in preparing the T-shirt for smuggling. Havens, in his direct testimony, acknowledged McLeroth's prior testimony that the cocaine "was taped or draped around his body and so on" but denied that he had "ever engage[d] in that kind of activity with Mr. McLeroth. . . ." This testimony could easily be understood as a denial of any connection with McLeroth's T-shirt and as a contradiction of McLeroth's testimony. Quite reasonably, it seems to us, the Government on cross-examination called attention to his answers on direct and then asked whether he had anything to do with sewing the cotton swatches on McLeroth's T-shirt. This was cross-examination growing out of Havens' direct testimony; and, as we hold above, the ensuing impeachment did not violate Havens' constitutional rights.

We reverse the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL and joined in Part I by MR. JUSTICE STEWART and MR. JUSTICE STEVENS, dissenting.

The Court upholds the admission at trial of illegally seized evidence to impeach a defendant's testimony deliberately elicited *by the Government* under the cover of impeaching an accused who takes the stand in his own behalf. I dissent. Criminal defendants now told that prosecutors are licensed to insinuate otherwise inadmissible evidence under the guise of cross-examination no longer have the unfettered right to elect whether or not to testify in their own behalf. Not only is today's decision an unwarranted departure from prior controlling cases, but, regrettably, it is yet another element in the trend to depreciate the constitutional protections guaranteed the criminally accused.

I

The question before us is not of first impression. The identical issue was confronted in *Agnello* v. *United States*, 269 U. S. 20 (1925), which determined—contrary to the instant decision—that it was constitutionally impermissible to admit evidence obtained in violation of the Fourth Amendment to rebut a defendant's response to a matter first raised during the Government's cross-examination. Subsequently, *Walder* v. *United States*, 347 U. S. 62 (1954), affirmed the introduction of unlawfully acquired evidence to impeach an accused's false assertions about previous conduct that had been offered during *direct* testimony. But *Walder* took pains to draw the distinction between its own holding and *Agnello*, noting that "the defendant [Walder] went beyond a mere denial of complicity in the crimes of which he was charged and made the sweep-

ing [and untrue] claim that he had never dealt in or possessed any narcotics." 347 U. S., at 65. In "shar[p] contras[t]," in *Agnello*, "the Government . . . tried to smuggle [the tainted evidence] . . . in on cross-examination," and "elicit[ed] the expected denial. . . ." 347 U. S., at 66.

The Court's recent decisions have left *Agnello* undisturbed. *Harris* v. *New York*, 401 U. S. 222 (1971), allowed the government to use inadmissible uncounseled statements to impeach direct examination. So, too, *Oregon* v. *Hass*, 420 U. S. 714 (1975), reaffirmed *Harris* in the context of impeachment of the defendant's direct testimony. Significantly, neither decision intimated that *Agnello* had lost vitality, or that the distinction emphasized by *Walder* had been effaced.

The Court's opinion attempts to discredit *Agnello* by casting a strawman as its holding, and then demolishing the pitiful scarecrow of its own creation. Specifically, the Court cites *Agnello*'s quotation of language from *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), that "illegally seized evidence 'shall not . . . be used at all,' " *ante*, at 624, and then refers to the subsequent decisions that indeed permit limited use of that evidence for impeachment. But the actual principle of *Agnello*, as discerned by *Walder*, is that the Government may not employ its power of cross-examination to predicate the admission of illegal evidence. In other words, impeachment by cross-examination about—or introduction of—suppressible evidence must be warranted by defendant's statements upon direct questioning. That principle is not at all inconsistent with later cases holding that the defendant may not take advantage of evidentiary suppression to advance specific perjurious claims as part of his direct case.

Nor is it correct to read *Agnello* as turning upon the tenuity of the link between the cross-examination involved there and the subject matter of the direct examination. *Ante*, at 625. The cross-examination about Agnello's previous connection with cocaine was reasonably related to his direct testimony that he lacked knowledge that the commodity he was trans-

porting was cocaine. 269 U. S., at 29–30. For "[t]he possession by Frank Agnello of the can of cocaine which was seized tended to show guilty knowledge and criminal intent on his part. . . ." *Id.*, at 35. Thus, the constitutional flaw found in *Agnello* was that the introduction of the tainted evidence had been prompted by statements of the accused first elicited upon cross-examination. And the case was so read in *Walder* v. *United States*. That decision specifically stated that a defendant "must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U. S., at 65. Since as a matter of the law of evidence it would be perfectly permissible to cross-examine a defendant as to his denial of complicity in the crime, the quoted passage in *Walder* must be understood to impose a further condition before the prosecutor may refer to tainted evidence—that is, some particular direct testimony by the accused that relies upon "the Government's disability to challenge his credibility." *Ibid.*

In fact, the Court's current interpretation of *Agnello* and *Walder* simply trivializes those decisions by transforming their Fourth Amendment holdings into nothing more than a constitutional reflection of the common-law evidentiary rule of relevance.

Finally, the rationale of *Harris* v. *New York* and *Oregon* v. *Hass* does not impel the decision at hand. The exclusionary rule exception established by *Harris* and *Hass* may be fairly easily cabined by defense counsel's willingness to forgo certain areas of questioning. But the rule prescribed by the Court in this case passes control of the exception to the Government, since the prosecutor can lay the predicate for admitting otherwise suppressible evidence with his own questioning. To be sure, the Court requires that cross-examination be "proper"; however, traditional evidentiary principles accord parties fairly considerable latitude in cross-

examining opposing witnesses. See C. McCormick, Law of Evidence §§ 21–24 (2d ed. 1972).[1] In practical terms, therefore, today's holding allows even the moderately talented prosecutor to "work in . . . evidence on cross-examination [as it would] in its case in chief. . . ." *Walder* v. *United States*, 347 U. S., at 66. To avoid this consequence, a defendant will be compelled to forgo testifying on his own behalf.

"[T]he Constitution guarantees a defendant the fullest opportunity to meet the accusation against him." *Id.*, at 65; see *Harris* v. *New York*, *supra*, at 229–230 (BRENNAN, J., dissenting). Regrettably, surrender of that guarantee is the price the Court imposes for the defendant to claim his right not to be convicted on the basis of evidence obtained in violation of the Constitution.[2] I cannot agree that one constitutional privilege must be purchased at the expense of another.

II

The foregoing demonstration of its break with precedent provides a sufficient ground to condemn the present ruling—unleashing, as it does, a hitherto relatively confined exception to the exclusionary rule. But I have a more fundamental difference with the Court's holding here, which culminates

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[1] Federal Rule of Evidence 611 does provide for limitation of the scope of cross-examination "to the subject matter of the direct examination and matters affecting the credibility of the witness." But even these constraints need not be adopted by the States, which are generally free to fashion their own rules of evidence.

[2] Although evidence of prior inconsistent utterances or behavior may ostensibly be offered merely to attack a defendant's credibility by contradicting his trial testimony, such evidence can also serve to buttress the affirmative elements of the prosecution's case. Thus, almost anytime an accused takes the stand, the prosecution will have an opportunity to enhance its case in chief. And it is unrealistic to assume that limiting instructions will afford the defendant significant protection. Cf. *Bruton* v. *United States*, 391 U. S. 123 (1968).

the approach taken in *Harris* v. *New York* and *Oregon* v. *Hass*. For this sequence of decisions undercuts the constitutional canon that convictions cannot be procured by governmental lawbreaking. See *Harris* v. *New York*, 401 U. S., at 226–232 (BRENNAN, J., dissenting); *Oregon* v. *Hass*, 420 U. S., at 724–725 (BRENNAN, J., dissenting).

"'[I]t is monstrous that courts should aid or abet the lawbreaking police officer.'" *Id.*, at 724, quoting *Harris* v. *New York*, *supra*, at 232 (BRENNAN, J., dissenting). And what is especially troubling about these cases is the mode of analysis employed by the Court. In each, the judgment that tainted evidence may be admitted has been bottomed upon a determination that the "incremental furthering" of constitutional ends would not be sufficient to warrant exclusion of otherwise probative evidence. *Ante*, at 627; see *Oregon* v. *Hass*, *supra*, at 721; *Harris* v. *New York*, *supra*, at 225.

Of course, "[t]here is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *Ante*, at 626. But it is also undeniable that promotion of that objective must be consonant with other ends, in particular those enshrined in our Constitution. I still hope that the Court would not be prepared to acquiesce in torture or other police conduct that "shocks the conscience" even if it demonstrably advanced the factfinding process. At any rate, what is important is that the Constitution does not countenance police misbehavior, even in the pursuit of truth. The processes of our judicial system may not be fueled by the illegalities of government authorities. See, *e. g.*, *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

Nevertheless, the Court has undertaken to strike a "balance" between the "policies" it finds in the Bill of Rights and the "competing interes[t]" in accurate trial determinations. *Ante*, at 627. This balancing effort is completely freewheeling. Far from applying criteria intrinsic to the Fourth and Fifth Amendments, the Court resolves succeeding cases simply by declaring that so much exclusion is enough to deter

police misconduct. *Ante*, at 626, 627; see *Oregon* v. *Hass*, *supra*, at 721; *Harris* v. *New York*, *supra*, at 225; cf. *Stone* v. *Powell*, 428 U. S. 465, 486–489 (1976); *United States* v. *Calandra*, 414 U. S. 338, 350–352 (1974). That hardly conforms to the disciplined analytical method described as "legal reasoning," through which judges endeavor to formulate or derive principles of decision that can be applied consistently and predictably.

Ultimately, I fear, this ad hoc approach to the exclusionary rule obscures the difference between judicial decisionmaking and legislative or administrative policymaking. More disturbingly, by treating Fourth and Fifth Amendment privileges as mere incentive schemes, the Court denigrates their unique status as *constitutional* protections. Yet the efficacy of the Bill of Rights as the bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional prescriptions. The Court is charged with the responsibility to enforce constitutional guarantees; decisions such as today's patently disregard that obligation.

Accordingly, I dissent.

GOMEZ *v.* TOLEDO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 79-5601. Argued April 16, 1980—Decided May 27, 1980

Held: In an action brought under 42 U. S. C. § 1983 against a public official whose position might entitle him to qualified immunity, the plaintiff is not required to allege that the defendant acted in bad faith in order to state a claim for relief, but the burden is on the defendant to plead good faith as an affirmative defense. By § 1983's plain terms, the plaintiff is required to make only two allegations in order to state a cause of action under the statute: (1) that some person deprived him of a federal right, and (2) that such person acted under color of state or territorial law. This allocation of the burden of pleading is supported by the nature of the qualified-immunity defense, since whether such immunity has been established depends on facts peculiarly within the defendant's knowledge and control, the applicable test focusing not only on whether he has an objectively reasonable basis for his belief that his conduct was lawful but also on whether he has a subjective belief. Pp. 638-641.

602 F. 2d 1018, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. REHNQUIST, J., filed a concurring statement, *post*, p. 642.

Michael Avery argued the cause for petitioner. With him on the brief was *David Rudovsky*.

Federico Cedo Alzamora argued the cause and filed a brief for respondent.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether, in an action brought under 42 U. S. C. § 1983 against a public official whose position might entitle him to qualified immunity, a plaintiff must

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**Leon Friedman* and *Bruce J. Ennis* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

allege that the official has acted in bad faith in order to state a claim for relief or, alternatively, whether the defendant must plead good faith as an affirmative defense.

I

Petitioner Carlos Rivera Gomez brought this action against respondent, the Superintendent of the Police of the Commonwealth of Puerto Rico, contending that respondent had violated his right to procedural due process by discharging him from employment with the Police Department's Bureau of Criminal Investigation.[1] Basing jurisdiction on 28 U. S. C. § 1343 (3),[2] petitioner alleged the following facts in his complaint.[3] Petitioner had been employed as an agent with the Puerto Rican police since 1968. In April 1975, he submitted a sworn statement to his supervisor in which he asserted that two other agents had offered false evidence for use in a criminal case under their investigation. As a result of this statement, petitioner was immediately transferred from the Criminal Investigation Corps for the Southern Area to Police Headquarters in San Juan, and a few weeks later to the Police Academy in Gurabo, where he was given no investigative authority. In the meantime respondent ordered an investigation of petitioner's claims, and the Legal Division of

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[1] The complaint originally named the Commonwealth of Puerto Rico and the police of the Commonwealth of Puerto Rico as additional defendants, but petitioner consented to their dismissal from the action. See App. 14, n. 1.

[2] That section grants the federal district courts jurisdiction "[t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[3] At this stage of the proceedings, of course, all allegations of the complaint must be accepted as true.

the Police Department concluded that all of petitioner's factual allegations were true.

In April 1976, while still stationed at the Police Academy, petitioner was subpoenaed to give testimony in a criminal case arising out of the evidence that petitioner had alleged to be false. At the trial petitioner, appearing as a defense witness, testified that the evidence was in fact false. As a result of this testimony, criminal charges, filed on the basis of information furnished by respondent, were brought against petitioner for the allegedly unlawful wiretapping of the agents' telephones. Respondent suspended petitioner in May 1976 and discharged him without a hearing in July. In October, the District Court of Puerto Rico found no probable cause to believe that petitioner was guilty of the allegedly unlawful wiretapping and, upon appeal by the prosecution, the Superior Court affirmed. Petitioner in turn sought review of his discharge before the Investigation, Prosecution, and Appeals Commission of Puerto Rico, which, after a hearing, revoked the discharge order rendered by respondent and ordered that petitioner be reinstated with backpay.

Based on the foregoing factual allegations, petitioner brought this suit for damages, contending that his discharge violated his right to procedural due process, and that it had caused him anxiety, embarrassment, and injury to his reputation in the community. In his answer, respondent denied a number of petitioner's allegations of fact and asserted several affirmative defenses. Respondent then moved to dismiss the complaint for failure to state a cause of action, see Fed. Rule Civ. Proc. 12 (b)(6), and the District Court granted the motion. Observing that respondent was entitled to qualified immunity for acts done in good faith within the scope of his official duties, it concluded that petitioner was required to plead as part of his claim for relief that, in committing the actions alleged, respondent was motivated by bad faith. The absence of any such allegation, it held, required dismissal of

the complaint. The United States Court of Appeals for the First Circuit affirmed. 602 F. 2d 1018 (1979).[4]

We granted certiorari to resolve a conflict among the Courts of Appeals.[5] 444 U. S. 1031 (1980). We now reverse.

II

Section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U. S. C. § 1983.[6] This statute, enacted to aid in "'the preservation of human liberty and human rights,'" *Owen* v. *City of Independence*, 445 U. S. 622, 636 (1980), quoting Cong. Globe, 42d Cong., 1st Sess., App. 68

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[4] This decision was in accord with earlier decisions in that Circuit. See, *e. g.*, *Gaffney* v. *Silk*, 488 F. 2d 1248 (1973); *Kostka* v. *Hogg*, 560 F. 2d 37 (1977); *Maiorana* v. *MacDonald*, 596 F. 2d 1072 (1979).

[5] Other Courts of Appeals have held that the burden of pleading a defense of good faith lies with the defendant. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F. 2d 1339, 1348 (CA2 1972); *Skehan* v. *Board of Trustees of Bloomsburg State College*, 538 F. 2d 53, 61–62 (CA3) (en banc), cert. denied, 429 U. S. 979 (1976); *Bryan* v. *Jones*, 530 F. 2d 1210, 1213 (CA5) (en banc), cert. denied, 429 U. S. 865 (1976); *Jones* v. *Perrigan*, 459 F. 2d 81, 83 (CA6 1972); *Tritsis* v. *Backer*, 501 F. 2d 1021, 1022–1023 (CA7 1974); *Landrum* v. *Moats*, 576 F. 2d 1320, 1324–1325, 1329 (CA8), cert. denied, 439 U. S. 912 (1978); *Martin* v. *Duffie*, 463 F. 2d 464, 468 (CA10 1972); *Dellums* v. *Powell*, 184 U. S. App. D. C. 275, 284–285, 566 F. 2d 167, 175–176 (1977), cert. denied, 438 U. S. 916 (1978). Cf. *McCray* v. *Burrell*, 516 F. 2d 357, 370 (CA4 1975) (en banc) (burden of proof), cert. dism'd, 426 U. S. 471 (1976); *Gilker* v. *Baker*, 576 F. 2d 245 (CA9 1978) (same).

[6] Section 1983 provides in full: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

(1871) (Rep. Shellabarger), reflects a congressional judgment that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees," 445 U. S., at 651. As remedial legislation, § 1983 is to be construed generously to further its primary purpose. See 445 U. S., at 636.

In certain limited circumstances, we have held that public officers are entitled to a qualified immunity from damages liability under § 1983. This conclusion has been based on an unwillingness to infer from legislative silence a congressional intention to abrogate immunities that were both "well established at common law" and "compatible with the purposes of the Civil Rights Act." 445 U. S., at 638. Findings of immunity have thus been "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976). In *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967), for example, we concluded that a police officer would be "excus[ed] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied." And in other contexts we have held, on the basis of "[c]ommon-law tradition . . . and strong public-policy reasons," *Wood* v. *Strickland*, 420 U. S. 308, 318 (1975), that certain categories of executive officers should be allowed qualified immunity from liability for acts done on the basis of an objectively reasonable belief that those acts were lawful. See *Procunier* v. *Navarette*, 434 U. S. 555 (1978) (prison officials); *O'Connor* v. *Donaldson*, 422 U. S. 563 (1975) (superintendent of state hospital); *Wood* v. *Strickland*, *supra* (local school board members); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974) (state Governor and other executive officers). Cf. *Owen* v. *City of Independence*, *supra* (no qualified immunity for municipalities).

Nothing in the language or legislative history of § 1983,

however, suggests that in an action brought against a public official whose position might entitle him to immunity if he acted in good faith, a plaintiff must allege bad faith in order to state a claim for relief. By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961). Petitioner has made both of the required allegations. He alleged that his discharge by respondent violated his right to procedural due process, see *Board of Regents* v. *Roth*, 408 U. S. 564 (1972), and that respondent acted under color of Puerto Rican law. See *Monroe* v. *Pape*, *supra*, at 172–187.[7]

Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. See *Procunier* v. *Navarette*, *supra*, at 562; *Pierson* v. *Ray*, *supra*, at 556, 557; *Butz* v. *Economou*, 438 U. S. 478, 508 (1978). Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ. Proc. 8 (c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969). It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith.

Our conclusion as to the allocation of the burden of pleading is supported by the nature of the qualified immunity

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[7] Actions under Puerto Rican law come within both § 1983 and its jurisdictional predicate, 28 U. S. C. § 1343 (3). *Examining Board* v. *Flores de Otero*, 426 U. S. 572 (1976).

defense. As our decisions make clear, whether such immunity has been established depends on facts peculiarly within the knowledge and control of the defendant. Thus we have stated that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer* v. *Rhodes, supra,* at 247–248. The applicable test focuses not only on whether the official has an objectively reasonable basis for that belief, but also on whether "[t]he official himself [is] acting sincerely and with a belief that he is doing right," *Wood* v. *Strickland, supra,* at 321. There may be no way for a plaintiff to know in advance whether the official has such a belief or, indeed, whether he will even claim that he does. The existence of a subjective belief will frequently turn on factors which a plaintiff cannot reasonably be expected to know. For example, the official's belief may be based on state or local law, advice of counsel, administrative practice, or some other factor of which the official alone is aware. To impose the pleading burden on the plaintiff would ignore this elementary fact and be contrary to the established practice in analogous areas of the law.[8]

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[8] As then Dean Charles Clark stated over 40 years ago: "It seems to be considered only fair that certain types of things which in common law pleading were matters in confession and avoidance—*i. e.*, matters which seemed more or less to admit the general complaint and yet to suggest some other reason why there was no right—must be specifically pleaded in the answer, and that has been a general rule." ABA, Proceedings Institute at Washington and Symposium at New York City on the Federal Rules of Civil Procedure 49 (1939). See also 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1270–1271 (1969). Cf. *FTC* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746, 759 (1945) (good-faith defense under Robinson-Patman Act); *Barcellona* v. *Tiffany English Pub., Inc.,* 597 F. 2d 464, 468 (CA5 1979); *Cohen* v. *Ayers,* 596 F. 2d 733, 739–740 (CA7 1979); *United States* v. *Kroll,* 547 F. 2d 393 (CA7 1977).

The decision of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST joins the opinion of the Court, reading it as he does to leave open the issue of the burden of persuasion, as opposed to the burden of pleading, with respect to a defense of qualified immunity.

CATALANO, INC., ET AL. *v.* TARGET SALES, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-1101. Decided May 27, 1980

Held: An alleged agreement among respondent wholesalers to eliminate short-term trade credit formerly granted to beer retailers and to require the retailers to make payment in cash, either in advance or upon delivery, is plainly anticompetitive as being tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional antitrust rule of *per se* illegality of price fixing, without further examination under the rule of reason.

Certiorari granted; 605 F. 2d 1097, reversed and remanded.

PER CURIAM.

Petitioners, a conditionally certified class of beer retailers in the Fresno, Cal., area, brought suit against respondent wholesalers alleging that they had conspired to eliminate short-term trade credit formerly granted on beer purchases in violation of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. The District Court entered an interlocutory order, which among other things, denied petitioners' "motion to declare this a case of *per se* illegality," and then certified to the United States Court of Appeals for the Ninth Circuit, pursuant to 28 U. S. C. § 1292 (b),[1] the

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[1] Title 28 U. S. C. § 1292 (b) provides:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not

question whether the alleged agreement among competitors fixing credit terms, if proved, was unlawful on its face.[2] The Court of Appeals granted permission to appeal, and, with one judge dissenting, agreed with the District Court that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. 605 F. 2d 1097 (1979).[3] We grant the petition for certiorari and reverse the judgment of the Court of Appeals.

For purposes of decision we assume the following facts alleged in the amended complaint[4] to be true. Petitioners allege that, beginning in early 1967, respondent wholesalers secretly agreed, in order to eliminate competition among themselves, that as of December 1967 they would sell to retailers only if payment were made in advance or upon delivery. Prior to the agreement, the wholesalers had extended credit without interest up to the 30- and 42-day limits permitted by state law.[5] According to the petition, prior to the agreement wholesalers had competed with each other with respect

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stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[2] In pertinent part, the District Judge's order read as follows:

" 'In the opinion of the Court, this order involves a controlling question of law, whether an agreement among competitors to eliminate the extension of trade credit constitutes a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. § 1), as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order will materially advance the ultimate termination of the litigation since this issue is central to the conduct of discovery and trial of this case.' " App. D to Pet. for Cert.

[3] The District Court had also granted summary judgment against two plaintiffs for failure to establish injury in fact. Those plaintiffs appealed separately. The Court of Appeals consolidated their appeal with the appeal taken pursuant to § 1292 (b) and unanimously reversed that portion of the District Court's order. No review is sought in this Court of that ruling.

[4] See Record 152.

[5] Cal. Bus. & Prof. Code Ann. § 25509 (West Supp. 1980).

to trade credit, and the credit terms for individual retailers had varied substantially.[6] After entering into the agreement, respondents uniformly refused to extend any credit at all.

The Court of Appeals decided that the credit-fixing agreement should not be characterized as a form of price fixing. The court suggested that such an agreement might actually enhance competition in two ways: (1) "by removing a barrier perceived by some sellers to market entry," and (2) "by the increased visibility of price made possible by the agreement to eliminate credit." *Id.*, at 1099.

In dissent, Judge Blumenfeld[7] expressed the opinion that an agreement to eliminate credit was a form of price fixing. *Id.*, at 1104. He reasoned that the extension of interest-free credit is an indirect price reduction and that the elimination of such credit is therefore a method of raising prices:

> "The purchase of goods creates an obligation to pay for them. Credit is one component of the overall price paid for a product. The cost to a retailer of purchasing goods consists of (1) the amount he has to pay to obtain the goods, and (2) the date on which he has to make that payment. If there is a differential between a purchase for cash and one on time, that difference is not interest but part of the price. See *Hogg* v. *Ruffner*, 66 U. S. (1 Black) 115, 118–119 . . . (1861). Allowing a retailer interest-free short-term credit on beer purchases effectively reduces the price of beer, when compared to a requirement that the retailer pay the same amount immediately in cash; and, conversely, the elimination of free credit is the equivalent of a price increase." *Id.*, at 1103.

It followed, in his view, that the agreement was just as plainly anticompetitive as a direct agreement to raise prices. Con-

[6] Pet. for Cert. 4.

[7] Senior District Judge for the District of Connecticut, sitting by designation.

sequently, no further inquiry under the rule of reason, see *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), was required in order to establish the agreement's unlawfulness.

Our cases fully support Judge Blumenfeld's analysis and foreclose both of the possible justifications on which the majority relied.[8] In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 7–8 (1979), we said:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' *National Society of Professional Engineers* v. *United States*, 435 U. S. 679, 692 (1978); *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 50 (1977), and so often 'lack . . . any redeeming virtue,' *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." [9]

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[8] Respondents nowhere suggest a procompetitive justification for a horizontal agreement to fix credit. Their argument is confined to disputing that settled case law establishes that such an agreement is unlawful on its face.

[9] The quotation from *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958), is drawn from the following passage: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation . . .—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. . . ."

A horizontal agreement to fix prices is the archetypal example of such a practice. It has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable. See, *e. g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397–398 (1927); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 340–341 (1897). In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful without any inquiry into the reasonableness of the program, even though there was no direct agreement on the actual prices to be maintained. In the course of the opinion, the Court made clear that

> "the machinery employed by a combination for price-fixing is immaterial.
>
> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.*, at 223.

Thus, we have held agreements to be unlawful *per se* that had substantially less direct impact on price than the agreement alleged in this case. For example, in *Sugar Institute* v. *United States*, 297 U. S. 553, 601–602 (1936), the Court held unlawful an agreement to adhere to previously announced prices and terms of sale, even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement. Similarly, an agreement among competing firms of professional engineers to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer was held unlawful without requiring further inquiry. *National Society of Professional Engineers* v. *United States*, *supra*, at 692–693. Indeed, a horizontal agreement among competitors to use a

specific method of quoting prices may be unlawful. Cf. *FTC* v. *Cement Institute*, 333 U. S. 683, 690–693 (1948).[10]

It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.[11] An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing.[12] While it

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[10] The Court there held that an agreement to use a multiple basing point pricing system was an unfair method of competition prohibited by § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45, even though the same conduct would also violate § 1 of the Sherman Act.

[11] See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 507 (1969): "In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product."

See also G. Lamb & C. Shields, Trade Association Law and Practice 129 (rev. ed. 1971) ("Credit terms are increasingly viewed as elements of price, and any interference with the elements of price is regarded as illegal per se under the Sherman Act"). Cf. P. Areeda, Antitrust Analysis 878 (2d ed. 1974) ("To charge cash and credit customers the same price is, economically speaking, to discriminate against the former"); *Hogg* v. *Ruffner*, 1 Black 115, 118–119 (1861).

[12] Cf. *Cement Mfrs. Protective Assn.* v. *United States*, 268 U. S. 588, 600 (1925), in which the Court upheld an exchange of information concerning credit in order to prevent fraud on the members of the association, but also noted that "[t]he evidence falls far short of establishing any understanding on the basis of which credit was to be extended to customers or that any co-operation resulted from the distribution of this information, or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer."

See also *Swift & Co.* v. *United States*, 196 U. S. 375, 392, 394 (1905);

may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price, that is surely not necessarily to be anticipated. It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers. In any event, when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.

The majority of the panel of the Court of Appeals suggested, however, that a horizontal agreement to eliminate credit sales may remove a barrier to other sellers who may wish to enter the market. But in any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases.

Nor can the informing function of the agreement, the increased price visibility, justify its restraint on the individual wholesaler's freedom to select his own prices and terms of sale. For, again, it is obvious that any industrywide agreement on prices will result in a more accurate understanding of the terms offered by all parties to the agreement. As the *Sugar Institute* case demonstrates, however, there is a plain distinction between the lawful right to publish prices and terms of sale, on the one hand, and an agreement among competitiors

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Wall Products Co. v. *National Gypsum Co.*, 326 F. Supp. 295 (ND Cal. 1971).

limiting action with respect to the published prices, on the other.

Thus, under the reasoning of our cases, an agreement among competing wholesalers to refuse to sell unless the retailer makes payment in cash either in advance or upon delivery is "plainly anticompetitive." Since it is merely one form of price fixing, and since price-fixing agreements have been adjudged to lack any "redeeming virtue," it is conclusively presumed illegal without further examination under the rule of reason.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES v. ROSARIO ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

No. 79-1294. Decided May 27, 1980

Held: The lower level of reimbursement provided to Puerto Rico under the Aid to Families with Dependent Children program does not violate the Fifth Amendment's equal protection guarantee. Congress, pursuant to its authority under the Territory Clause of the Constitution to make all needful rules and regulations respecting Territories, may treat Puerto Rico differently from States so long as there is a rational basis for its actions, as here. Cf. *Califano* v. *Torres*, 435 U. S. 1.

Reversed.

PER CURIAM.

The Aid to Families with Dependent Children program (AFDC), 49 Stat. 627, as amended, 42 U. S. C. § 601 *et seq.*, provides federal financial assistance to States and Territories to aid families with needy dependent children. Puerto Rico receives less assistance than do the States, 42 U. S. C. §§ 1308 (a)(1), 1396d (b) (1976 ed. and Supp. II). Appellees, AFDC recipients residing in Puerto Rico, filed this class action against the Secretary of Health, Education, and Welfare (now the Secretary of Health and Human Services) in March 1977 in the United States District Court for the District of Puerto Rico; they challenged the constitutionality of 42 U. S. C. §§ 1308 and 1396d (b), claiming successfully that the lower level of AFDC reimbursement provided to Puerto Rico violates the Fifth Amendment's equal protection guarantee.

We disagree. Congress, which is empowered under the Territory Clause of the Constitution, U. S. Const., Art. IV, § 3, cl. 2, to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," may treat Puerto Rico differently from States so long as there is a

rational basis for its actions. In *Califano* v. *Torres*, 435 U. S. 1 (1978) (*per curiam*), we concluded that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do not contribute to the federal treasury; the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy. These same considerations are forwarded here in support of §§ 1308 and 1396d (b), Juris. Statement 12–14,* and we see no reason to depart from our conclusion in *Torres* that they suffice to form a rational basis for the challenged statutory classification.

We reverse.

So ordered.

MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN, not now being persuaded that the Court's summary disposition in *Califano* v. *Torres*, 435 U. S. 1 (1978), so clearly controls this case, would note probable jurisdiction and set the case for oral argument.

MR. JUSTICE MARSHALL, dissenting.

The Court today rushes to resolve important legal issues without full briefing or oral argument. The sole authority cited for the majority's result is another summary decision by this Court. The need for such haste is unclear. The dangers of such decisionmaking are clear, however, as the Court's analysis is, in my view, ill-conceived in at least two respects.

The first question that merits plenary attention is whether Congress, acting pursuant to the Territory Clause of the Constitution, U. S. Const., Art. IV, § 3, cl. 2, "may treat Puerto

*For example, the Secretary estimates that the additional cost of treating Puerto Rico as a State for AFDC purposes alone would be approximately $30 million per year, and, if the decision below were to apply equally to various other reimbursement programs under the Social Security Act, the total annual cost could exceed $240 million. Juris. Statement 12, n. 13.

Rico differently from States so long as there is a rational basis for its actions." *Ante*, at 651–652. No authority is cited for this proposition. Our prior decisions do not support such a broad statement.

It is important to remember at the outset that Puerto Ricans are United States citizens, see 8 U. S. C. § 1402, and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens.[1] While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico, see, *e. g.*, *Downes* v. *Bidwell*, 182 U. S. 244 (1901); *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), the present validity of those decisions is questionable. See *Torres* v. *Puerto Rico*, 442 U. S. 465, 475–476 (1979) (BRENNAN, J., concurring in judgment). We have already held that Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 668–669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976). The Fourth Amendment is also fully applicable to Puerto Rico, either directly or by operation of the Fourteenth Amendment, *Torres* v. *Puerto Rico*, *supra*, at 471. At least four Members of this Court are of the view that all provisions

[1] The District Court certified the plaintiff class as "all United States citizens residing in the Commonwealth of Puerto Rico, which [*sic*] are recipients of public assistance under the Aid to the Families with Dependent Children category and that have been, are and will be discriminated [against] solely on the basis of their residence." App. to Juris. Statement 2a.

It is unclear whether the Court's Territory Clause analysis is intended to apply only where the discrimination is against the Government of Puerto Rico and not against persons residing there. Such a distinction would lack substance in any event. The discrimination against Puerto Rico under the AFDC program must also operate as a discrimination against United States citizens residing in Puerto Rico who would benefit, one way or another, from such increased federal aid to Puerto Rico.

of the Bill of Rights apply to Puerto Rico. 442 U. S., at 475–476 (BRENNAN, J., joined by STEWART, MARSHALL, and BLACKMUN, JJ., concurring in judgment).

Despite these precedents, the Court suggests today, without benefit of briefing or argument, that Congress needs only a rational basis to support less beneficial treatment for Puerto Rico, and the citizens residing there, than is provided to the States and citizens residing in the States. Heightened scrutiny under the equal protection component of the Fifth Amendment, the Court concludes, is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause. Such a proposition surely warrants the full attention of this Court before it is made part of our constitutional jurisprudence.

Califano v. *Torres*, 435 U. S. 1 (1978) (*per curiam*), the only authority upon which the majority relies, does not stand for the proposition the Court espouses today. In that decision, also reached through summary procedures and over the objections of two Members of the Court, see *id.*, at 5 (statement of BRENNAN, J.; statement of MARSHALL, J.), the Court held that the right to travel was not violated by a provision of the Social Security Act pursuant to which persons residing in the United States lost their supplemental security income benefits upon moving to Puerto Rico. While the plaintiffs in that case had also challenged the provision on equal protection grounds, the District Court relied entirely on the right to travel,[2] and therefore no equal protection

[2] The District Court concluded that "[w]e are not here concerned with the alleged power of Congress to establish disparate treatment towards the United States citizens who reside in Puerto Rico. Rather, the focus of our attention should be directed to determining whether a constitutional right of a citizen of the United States has been improperly penalized while he is within one of these States. We see this as the more relevant framing of the issues because although Plaintiff lost his benefits while physically in Puerto Rico, the statutory prohibitions that permitted this result came into play from the very moment when they exerted their force

question was before this Court.[3] The Court merely referred to the equal protection claim briefly in a footnote, *id.*, at 3, n. 4. Observing that Puerto Rico's relationship with the United States was unique, the Court simply noted that the District Court had "apparently acknowledged that Congress has the power to treat Puerto Rico differently, and that every federal program does not have to be extended to it." *Ibid.*[4] That Puerto Rico has an unparalleled relationship with the United States does not lead ineluctably to the legal principle asserted here. At most, reading more into that single footnote of dictum than it deserves, *Califano* v. *Torres* may suggest that under the equal protection component of the Due Process Clause of the Fifth Amendment, Puerto Rico may be treated differently from the States if there is a rational basis for the discrimination when Congress enacts a law providing for governmental payments of monetary benefits. See *id.*, at 5. That is a more limited view than is asserted in this case, but even that position should be reached only after oral argument and full briefing. *Ibid.* (statement of MARSHALL, J.).

I also object to the Court's reliance on the effect greater benefits could have on the Puerto Rican economy. *Ante*, at 652. See also *Califano* v. *Torres*, *supra*, at 5, n. 7. This rationale has troubling overtones. It suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because

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upon Plaintiff. From this standpoint, Plaintiff is in the same position now as if he would have remained in Connecticut and brought a declaratory judgment suit there. . . ." *Torres* v. *Mathews*, 426 F. Supp. 1106, 1110 (1977) (emphasis deleted).

[3] The question presented in *Califano* v. *Torres* was whether the sections of the Social Security Act excluding residents of Puerto Rico from the Supplemental Security Income program "deny due process to individuals who upon moving to Puerto Rico lose the benefits to which they were entitled while residing in the United States." Juris. Statement, O. T. 1977, No. 77-88, p. 2. See also *id.*, at 9-11.

[4] The accuracy of this assessment of the District Court's opinion is open to question. See n. 2, *supra*.

otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset. Similarly, reliance on the fear of disrupting the Puerto Rican economy implies that Congress intended to preserve or even strengthen the comparative economic position of the States vis-à-vis Puerto Rico. Under this theory, those geographic units of the country which have the strongest economies presumably would get the most financial aid from the Federal Government since those units would be the least likely to be "disrupted." Such an approach to a financial assistance program is not so clearly rational as the Court suggests, and there is no citation by the Court to any suggestion in the legislative history that Congress had these economic concerns in mind when it passed the portion of the AFDC program presently being challenged. Nor does appellant refer to any evidence in the record supporting the notion that such a speculative fear of economic disruption is warranted.[5] In my view it is by no means clear that the discrimination at issue here could survive scrutiny under even a deferential equal protection standard.

Ultimately this case raises the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution. An issue of this magnitude deserves far more careful attention than it has received in *Califano* v. *Torres* and in the present case. I would note probable jurisdiction and set the case for oral argument. Accordingly, I dissent from the Court's summary disposition.

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[5] Appellant's suggestion that increased federal reimbursements might not go to the class members at all but instead be used to provide other services or to lower taxes, see Juris. Statement 10, demonstrates the speculative nature of this fear of economic disruption.

Syllabus

ANDRUS, SECRETARY OF THE INTERIOR *v.* SHELL OIL CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78–1815. Argued January 15, 1980—Decided June 2, 1980

The general mining law of 1872 permits citizens to explore the public domain and search for minerals and, if they discover "valuable mineral deposits," to obtain title to the land on which such deposits are located. The Mineral Leasing Act (Act), enacted in 1920, withdrew oil shale from the general mining law and provided that thereafter oil shale would be subject to disposition only through leases, except that a savings clause preserved valid claims existent at the date of passage of the Act. Upon complaints by the Department of the Interior (Department) alleging that respondents' claims for oil shale deposits located prior to the Act were invalid, a hearing examiner ruled the claims valid on the ground that the Department's 1927 decision in *Freeman* v. *Summers*, 52 L. D. 201, wherein it was held that "present marketability" is not a prerequisite to the patentability of oil shale deposits as "valuable mineral deposits," compelled the conclusion that oil shale is a valuable mineral subject to appropriation under the mining laws, despite substantial evidence that oil shale operations were commercially infeasible. The Board of Land Appeals reversed, holding that oil shale claims located prior to 1920 failed the test of value because at the time of location there did not appear as a present fact a reasonable prospect of success in developing an operating mine that would yield a reasonable profit. It rejected prior departmental precedent, particularly *Freeman* v. *Summers*, as being inconsistent with the general mining law and therefore unsound. On appeal, the District Court reversed and held the claims valid, finding that Congress had implicitly "ratified" the rule of *Freeman* v. *Summers*, and that in any event the Department was estopped from departing from the longstanding *Freeman* standard. The Court of Appeals affirmed.

Held: The oil shale deposits in question are "valuable mineral deposits" patentable under the Act's savings clause. The Act's history and the developments subsequent to its passage indicate that the Government should not be permitted to invalidate pre-1920 oil shale claims by imposing a present marketability requirement on such claims. The Department's original position, as set forth in Instructions, issued shortly after the Act became law, authorizing the General Land Office

to begin adjudicating applications for patents for pre-1920 oil shale claims, and later enunciated in *Freeman* v. *Summers*, is the correct view of the Act as it applies to the patentability of pre-1920 oil shale claims. Pp. 663–673.

591 F. 2d 597, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 673.

Deputy Solicitor General Wallace argued the cause for petitioner. On the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Clairborne, Mark I. Levy, Dirk D. Snel,* and *Robert L. Klarquist.*

Fowler Hamilton argued the cause for respondents. With him on the brief were *Richard W. Hulbert, Donald L. Morgan, H. Michael Spence, Claron C. Spencer,* and *Norma L. Comstock.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The general mining law of 1872, 30 U. S. C. § 22 *et seq.*, provides that citizens may enter and explore the public domain, and search for minerals; if they discover "valuable mineral deposits," they may obtain title to the land on which such deposits are located.[1] In 1920 Congress altered this

[1] Discovery of a "valuable mineral" is not the only prerequisite of patentability. The mining law also provides that until a patent is issued a claimant must perform $100 worth of labor or make $100 of improvements on his claim during each year and that a patent may issue only on a showing that the claimant has expended a total of $500 on the claim. 30 U. S. C. §§ 28, 29. See *Hickel* v. *Oil Shale Corp.*, 400 U. S. 48 (1970). In addition, a claim "must be distinctly marked on the ground so that its boundaries can be readily traced." 30 U. S. C. § 28; *Kendall* v. *San Juan Silver Mining Co.*, 144 U. S. 658 (1892). If the requirements of the mining law are satisfied, the land may be patented for $2.50 per acre. 30 U. S. C.

program with the enactment of the Mineral Leasing Act. 41 Stat. 437, as amended, 30 U. S. C. § 181 *et seq.* The Act withdrew oil shale and several other minerals from the general mining law and provided that thereafter these minerals would be subject to disposition only through leases. A savings clause, however, preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." [2]

The question presented is whether oil shale deposits located prior to the 1920 Act are "valuable mineral deposits" patentable under the savings clause of the Act.

I

The action involves two groups of oil shale claims located by claimants on public lands in Garfield County, Colo., prior to the enactment of the Mineral Leasing Act.[3] The first group of claims, designated Mountain Boys Nos. 6 and 7, was located in 1918. In 1920, a business trust purchased the claims for $25,000, and in 1924 an application for patent was filed with

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§ 37. There is no deadline within which a locator must file for patent, though to satisfy the discovery requirement the claimant must show the existence of "valuable mineral deposits" both at the time of location and at the time of determination. *Barrows* v. *Hickel*, 447 F. 2d 80, 82 (CA9 1971).

[2] The savings clause is contained in § 37 of the Act, 41 Stat. 451, as amended, which, as set forth in 30 U. S. C. § 193, provides in full:

"The deposits of coal, phosphate, sodium, potassium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits in Lander, Wyoming, coal entries numbered 18 to 49, inclusive, shall be subject to disposition only in the form and manner provided in this chapter, except as to valid claims existent on February 25, 1920, and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

[3] Oil shale is a sedimentary rock containing an organic material called kerogen which, upon destructive distillation, produces a substantial amount of oil.

the Department of the Interior. Some 20 years later, after extended investigative and adjudicatory proceedings, the patent was rejected "without prejudice" on the ground that it was not then vigorously pursued. In 1958, Frank W. Winegar acquired the claims and filed a new patent application. In 1964, Winegar conveyed his interests in the claims to respondent Shell Oil Company.

The second group of claims, known as Harold Shoup Nos. 1–4, was located in 1917. In 1923, the claims were acquired by Karl C. Schuyler who in 1933 bequeathed them to his surviving spouse. In 1960, Mrs. Schuyler incorporated respondent D. A. Shale, Inc., and transferred title to the claims to the corporation. Three months later, the corporation filed patent applications.

In 1964, the Department issued administrative complaints alleging that the Mountain Boys claims and the Shoup claims were invalid. The complaints alleged, *inter alia*, that oil shale was not a "valuable mineral" prior to the enactment of the 1920 Mineral Leasing Act.

The complaints were consolidated and tried to a hearing examiner who in 1970 ruled the claims valid. The hearing examiner observed that under established case law the test for determining a "valuable mineral deposit" was whether the deposit was one justifying present expenditures with a reasonable prospect of developing a profitable mine. See *United States* v. *Coleman*, 390 U. S. 599 (1968); *Castle* v. *Womble*, 19 L. D. 455 (1894).[4] He then reviewed the history

[4] In *Chrisman* v. *Miller*, 197 U. S. 313 (1905), this Court approved the Department of the Interior's "prudent-man test" under which discovery of a "valuable mineral deposit" requires proof of a deposit of such character that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." *Castle* v. *Womble*, 19 L. D., at 457. Accord, *Best* v. *Humboldt Placer Mining Co.*, 371 U. S. 334, 335–336 (1963); *Cameron* v. *United States*, 252 U. S. 450, 459 (1920). In *United States* v. *Coleman*, the Court approved the Department's marketability

of oil shale operations in this country and found that every attempted operation had failed to show profitable production. On the basis of this finding and other evidence showing commercial infeasibility, the hearing examiner reasoned that "[i]f this were a case of first impression," oil shale would fail the "valuable mineral deposit" test. However, he deemed himself bound by the Department's contrary decision in *Freeman* v. *Summers*, 52 L. D. 201 (1927). There, the Secretary had written:

> "While at the present time there has been no considerable production of oil from shales, due to the fact that abundant quantities of oil have been produced more cheaply from wells, *there is no possible doubt of its value and of the fact that it constitutes an enormously valuable resource for future use by the American people.*
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> "It is not necessary, in order to constitute a valid discovery under the general mining laws sufficient to support an application for patent, that the mineral *in its present situation* can be immediately disposed of at a profit." *Id.*, at 206. (Emphasis added.)

The hearing examiner ruled that *Freeman* v. *Summers* compelled the conclusion that oil shale is a valuable mineral subject to appropriation under the mining laws, and he upheld the Mountain Boys and Shoup claims as valid and patentable.

The Board of Land Appeals reversed. Adopting the findings of the hearing examiner, the Board concluded that oil shale claims located prior to 1920 failed the test of value because at the time of location there did not appear "as a *present* fact . . . a reasonable prospect of success in developing an operating mine that would yield a reasonable profit." (Emphasis in original.) The Board recognized that this conclusion was at odds with prior departmental precedent, and

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test—whether a mineral can be "extracted, removed and marketed at a profit"—deeming it a logical complement of the prudent-man standard.

particularly with *Freeman* v. *Summers;* but it rejected that precedent as inconsistent with the general mining law and therefore unsound. The Board then considered whether its newly enunciated interpretation should be given only prospective effect. It found that respondents' reliance on prior rulings was minimal and that the Department's responsibility as trustee of public lands required it to correct a plainly erroneous decision.[5] Accordingly, it ruled that its new interpretation applied to the Mountain Boys and Shoup claims, and that those claims were invalid.

Respondents appealed the Board's ruling to the United States District Court for the District of Colorado. The District Court agreed with the Board that by not requiring proof of "present marketability" the decision in *Freeman* v. *Summers* had liberalized the traditional valuable mineral test. But it found that Congress in 1931 and again in 1956 had considered the patentability of oil shale and had implicitly "ratified" that liberalized rule. Alternatively, the District Court concluded that the Department was estopped now from departing from the *Freeman* standard which investors had "relied upon . . . for the past half-century." *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894, 907 (1977). On these grounds, it reversed the Board's ruling and held that the claims at issue were valid.

The Court of Appeals for the Tenth Circuit affirmed. 591 F. 2d 597 (1979). It agreed with the District Court that the "different treatment afforded all oil shale claims as to the 'valuable mineral deposit' element of a location became a part of the general mining laws by reason of its adoption and ap-

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[5] The Board observed that "[a]lthough Shell . . . expended some $18,780 in perfecting title to and preparing patent application for the Mountain Boy claims before 1964, it did not purchase [the claims] from Frank Winegar for $30,000 [until] after initiation of the contest proceedings." And it found no evidence that D. A. Shale, Inc., or its predecessors had invested "more than a minimal amount" in the purchase of the Shoup claims in reliance on the *Freeman* decision.

proval by both Houses of Congress" in the years after 1920. *Id.*, at 604. And it held that the Department now must adhere to the *Freeman* rule. We granted certiorari because of the importance of the question to the management of the public lands. 444 U. S. 822 (1979). We affirm.

II

The legislative history of the 1920 Mineral Leasing Act shows that Congress did not consider "present marketability" a prerequisite to the patentability of oil shale.[6] In the extensive hearings and debates that preceded the passage of the 1920 Act, there is no intimation that Congress contemplated such a requirement; indeed, the contrary appears. During the 1919 floor debates in the House of Representatives, an amendment was proposed which would have substituted the phrase "deposits in paying quantities" for "valuable mineral." That amendment, however, was promptly withdrawn after Mr. Sinott, the House floor manager, voiced his objection to the change:

> "Mr. SINOTT. That language was put in with a great deal of consideration and we would not like to change from 'valuable' to 'paying.' *There is quite a distinction.* We are in line with the decisions of the courts as to what is a discovery, and I think it would be a very

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[6] Congress was aware that there was then no commercially feasible method for extracting oil from oil shale. The 1918 Report of the House Committee on the Public Lands, for example, had emphasized that

"no commercial quantity or any appreciable amount of shale oil has ever been produced in this country, nor any standardized process of production has yet been evolved or recommended or agreed upon in this country by the Bureau of Mines or anyone else, and it has not yet been demonstrated that the oil-shale industry can be made commercially profitable. . . ." H. R. Rep. No. 563, 65th Cong., 2d Sess., 18 (1918).

See also 58 Cong. Rec. 4271, 4279 (1919) (remarks of Sen. Smoot); Hearings on H. R. 3232 and S. 2812 before the House Committee on the Public Lands, 65th Cong., 2d Sess., 811, 890, 1257 (1918) (hereafter Hearings).

> dangerous matter to experiment with this language at this time." 58 Cong. Rec. 7537 (1919) (emphasis added).

An examination of the relevant decisions at the time underscores the point. Those decisions are clear in rejecting a requirement that a miner must "demonstrat[e] that the vein . . . would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner," *Book* v. *Justice Mining Co.*, 58 F. 106, 124 (CC Nev. 1893), and in holding that "it is enough if the vein or deposit 'has a present *or prospective* commercial value.'" *Madison* v. *Octave Oil Co.*, 154 Cal. 768, 772, 99 P. 176, 178 (1908) (emphasis added). Accord, *Cascaden* v. *Bartolis*, 146 F. 739 (CA9 1906); *United States* v. *Ohio Oil Co.*, 240 F. 996, 998 (Wyo. 1916); *Montana Cent. R. Co.* v. *Migeon*, 68 F. 811, 814 (CC Mont. 1895); *East Tintic Consolidated Mining Co.*, 43 L. D. 79, 81 (1914); 2 C. Lindley, American Law Relating to Mines and Mineral Lands § 336, pp. 768–769 (3d ed. 1914). See generally Reeves, The Origin and Development of the Rules of Discovery, 8 Land & Water L. Rev. 1 (1973).

To be sure, prior to the passage of the 1920 Act, there existed considerable uncertainty as to whether oil shale was patentable.[7] That uncertainty, however, related to whether oil shale was a "mineral" under the mining law, and not to its "value." Similar doubts had arisen in the late 19th cen-

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[7] Mr. John Fry, one of the Committee witnesses who represented the oil shale interests before Congress, was candid on that point:

"Mr. TAYLOR. There is a large amount of this shale land that has been located and is now held under the placer law. But none of it has yet gone to patent.

"The Chairman. Has one acre of this land withdrawn in Colorado been patented?

"Mr. FRY. No.

"The Chairman. So you do not know what the holding of the department will be?

"Mr. FRY. We do not." Hearings, at 912.

See also *id.*, at 626, 873, 913, 918, 1240, 1256–1257.

tury in regard to petroleum. Indeed, in 1896 the Secretary of the Interior had held that petroleum claims were not subject to location under the mining laws, concluding that only lands "containing the more precious metals . . . gold, silver, cinnabar etc." were open to entry. *Union Oil Co.*, 23 L. D. 222, 227. The Secretary's decision was short-lived. In 1897, Congress enacted the Oil Placer Act authorizing entry under the mining laws to public lands "containing petroleum or other mineral oils." Ch. 216, 29 Stat. 526. This legislation put to rest any doubt about oil as a mineral. But because oil shale, strictly speaking, contained kerogen and not oil, see n. 3, *supra*, its status remained problematic. See Reidy, Do Unpatented Oil Shale Claims Exist?, 43 Denver L. J. 9, 12 (1966).

That this was the nature of the uncertainty surrounding the patentability of oil shale claims is evident from remarks made throughout the hearings and debates on the 1920 Act. In the 1918 hearings, Congressman Barnett, for example, explained:

> "Mr. BARNETT. . . . If the department should contend that shale lands come within the meaning of the term 'oil lands' they must perforce, by the same argument, admit that they are placer lands within the meaning of the act of 1897.
>
> "The Chairman. And patentable?
>
> "Mr. BARNETT. And patentable under that act." Hearings, at 918.

The enactment of the 1920 Mineral Leasing Act put an end to these doubts. By withdrawing "oil shale . . . in lands valuable for such minerals" from disposition under the general mining law, the Congress recognized—at least implicitly—that oil shale *had been* a locatable mineral. In effect, the 1920 Act did for oil shale what the 1897 Oil Placer Act had done for oil. And, as Congressman Barnett's ready answer demonstrates, once it was settled that oil shale was a mineral

subject to location, and once a savings clause was in place preserving pre-existing claims, it was fully expected that such claims would be patentable. The fact that oil shale then had no commercial value simply was not perceived as an obstacle to that end.

III

Our conclusion that Congress in enacting the 1920 Mineral Leasing Act contemplated that pre-existing oil shale claims could satisfy the discovery requirement of the mining law is confirmed by actions taken in subsequent years by the Interior Department and the Congress.[8]

A

On May 10, 1920, less than three months after the Mineral Leasing Act became law, the Interior Department issued "Instructions" to its General Land Office authorizing that Office to begin adjudicating applications for patents for pre-1920 oil shale claims. The Instructions advised as follows:

> "Oil shale having been thus recognized by the Department and *by Congress* as a *mineral* deposit and a source of petroleum . . . lands valuable on account thereof *must be held to have been subject to valid location and*

[8] This Court has observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960). This sound admonition has guided several of our recent decisions. See, *e. g*, *TVA* v. *Hill*, 437 U. S. 153, 189–193 (1978); *SEC* v. *Sloan*, 436 U. S. 103, 119–122 (1978). Yet we cannot fail to note Mr. Chief Justice Marshall's dictum that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). In consequence, while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent. See, *e. g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974).

> *appropriation under the placer mining laws,* to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas." 47 L. D. 548, 551 (1920) (emphasis added).

The first such patent was issued immediately thereafter. Five years later, the Department ruled that patentability was dependent upon the "character, extent, and mode of occurrence of the oil-shale deposits." *Dennis* v. *Utah,* 51 L. D. 229, 232 (1925). Present profitability was not mentioned as a relevant, let alone a critical, consideration.

In 1927, the Department decided *Freeman* v. *Summers,* 52 L. D. 201. The case arose out of a dispute between an oil shale claimant and an applicant for a homestead patent, and involved two distinct issues: (1) whether a finding of lean surface deposits warranted the geological inference that the claim contained rich "valuable" deposits below; and (2) whether present profitability was a prerequisite to patentability. Both issues were decided in favor of the oil shale claimant: the geological inference was deemed sound and the fact that there was "no possible doubt . . . that [oil shale] constitutes an enormously valuable resource for future use by the American people" was ruled sufficient proof of "value." *Id.,* at 206.

For the next 33 years, *Freeman* was applied without deviation.[9] It was said that its application ensured that "valid rights [would] be protected and permitted to be perfected." Secretary of Interior Ann. Rep. 30 (1927). In all, 523 patents for 2,326 claims covering 349,088 acres were issued under the *Freeman* rule. This administrative practice, begun immediately upon the passage of the 1920 Act, "has peculiar weight [because] it involves a contemporaneous con-

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[9] See, *e. g., John M. Debevoise,* 67 I. D. 177, 180 (1960); *United States* v. *Strauss,* 59 I. D. 129, 140–142 (1945); *Location of Oil Shale Placer Claims,* 52 L. D. 631 (1929); *Assessment Work on Oil-Shale Claims,* 52 L. D. 334 (1928); *Standard Shales Products Co.,* 52 L. D. 522 (1928); *James W. Bell,* 52 L. D. 197 (1927).

struction of [the] statute by the men charged with the responsibility of setting its machinery in motion," *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). Accord, *e. g.*, *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719 (1975); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). It provides strong support for the conclusion that Congress did not intend to impose a present marketability requirement on oil shale claims.

B

In 1930 and 1931, congressional committees revisited the 1920 Mineral Leasing Act and re-examined the patentability of oil shale claims. Congressional interest in the subject was sparked in large measure by a series of newspaper articles charging that oil shale lands had been "improvidently, erroneously, and unlawfully, if not corruptly, transferred to individuals and private corporations." 74 Cong. Rec. 1079 (1930) (S. Res. 379). The articles were based upon accusations leveled at the Interior Department by Ralph S. Kelly, then the General Land Office Division Inspector in Denver. Kelly's criticism centered on the *Freeman* v. *Summers* decision. Fearing another "Teapot Dome" scandal, the Senate authorized the Committee on Public Lands to "inquire into . . . the alienation of oil shale lands."

The Senate Committee held seven days of hearings focusing almost exclusively on "the so-called Freeman-Summers case." Hearings on S. Res. 379 before the Senate Committee on Public Lands and Surveys, 71st Cong., 3d Sess., 2 (1931). At the outset of the hearings, the Committee was advised by E. C. Finney, Solicitor, Department of the Interior, that 124 oil shale patents had been issued covering 175,000 acres of land and that 63 more patent applications were pending. Finney's statement prompted this interchange:

> "Senator PITTMAN: Well, were the shales on those patented lands of commercial value?

"Mr. FINNEY: If you mean by that whether they could have been mined and disposed of at a profit at the time of the patent, or now, the answer is no.

. . . . . .

"Senator PITTMAN: So the Government has disposed of 175,000 acres in patents on lands which in your opinion there was no valid claim to in the locator?

"Mr. FINNEY: No; that was not my opinion. I have never held in the world, that I know of, that you had to have an actual commercial discovery of any commodity that you could take out *and market at a profit.* On the contrary, the department has held that that is not the case. . . ." *Id.*, at 25 (emphasis added).

Later in the hearings Senator Walsh expressed his understanding of the impact of the *Freeman* decision:

"Senator WALSH: [It means] . . . that the prospector having found at the surface the layer containing any quantity of mineral, that is of oil-bearing shale or kerogen, that that would be a discovery in view of the beds down below of richer character.

"Mr. FINNEY: In this formation, yes sir; that is correct." *Id.*, at 138.

See also *id.*, at 22–23, 26, 163. The Senate Committee did not produce a report. But one month after the hearings were completed, Senator Nye, the Chairman of the Committee, wrote the Secretary of the Interior that he had " 'conferred with Senator Walsh and beg[ged] to advise that there is no reason why your Department should not proceed to final disposition of the pending application for patents to oil shale lands in conformity with the law.' " App. 103. The patenting of oil shale lands under the standards enunciated in *Freeman* was at once resumed.

At virtually the same time, the House of Representatives commenced its own investigation into problems relating to

oil shale patents. The House Committee, however, focused primarily on the question of assessment work—whether an oil shale claimant was required to perform $100 work per year or forfeit his claim—and not on discovery. But the impact of the *Freeman* rule was not lost on the Committee:

> "Mr. SWING. In furtherance of the policy of conservation, Mr. Secretary, in view of the fact that there has not been discovered, as I understand it, any practical economical method of extracting oil from the shale in competition with oil wells . . . would it not be proper public policy to withdraw all shale lands from private acquisition, since we are compelled to recognize, perforce, economic and fiscal conditions, that no one is going to make any beneficial use of the oil shale in the immediate future, but is simply putting it in cold storage as a speculative proposition?
>
> "Secretary WILBUR: As a matter of conservation, what you say is true, but what we have to meet here is the fact that in the leasing act there was a clause to the effect that valid existing claims were not included, and so we are dealing with claims that are thought to be valid, and the question—
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> "Mr. SWING (interposing). I realize that, and I understand the feeling of Congress, and I think generally the country, that in drawing the law we do not want to cut the ground from under the person who has initiated a right." Consolidated Hearings on Applications for Patent on Oil Shale Lands before the House Committee on the Public Lands, 71st Cong., 3d Sess., 100 (1931).[10]

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[10] At the conclusion of its hearings, the Committee recommended legislation placing a deadline on the filing of patent applications for oil shale claims and permitting an oil shale claimant to pay $100 a year to the Land Office in lieu of $100 in annual assessment work. Other aspects of the oil shale patentability—including the question of discovery—were

Congressman Swing's statement of the "feeling of Congress" comports with our reading of the 1920 statute and of congressional intent. To hold now that *Freeman* was wrongly decided would be wholly inconsistent with that intent. Moreover, it would require us to conclude that the Congress in 1930–1931 closed its eyes to a major perversion of the mining laws. We reject any such conclusion.

C

In 1956 Congress again turned its attention to the patentability of oil shale. That year it amended the mining laws by eliminating the requirement that locators must obtain and convey to the United States existing homestead surface-land patents in order to qualify for a mining patent on minerals withdrawn under the 1920 Mineral Leasing Act. See Pub. L. 743, 70 Stat. 592. Where a surface owner refused to cooperate with the mining claimant and sell his estate, this requirement prevented the mining claimant from patenting his claim. See *James W. Bell*, 52 L. D. 197 (1927). In hearings on the amendment, it was emphasized that oil shale claimants would be principal beneficiaries of the amendment:

> "Mr. ASPINALL. This [bill] does not have to do with any other minerals except the leaseable minerals to which no one can get a patent since 1920. . . . As far as I know, there are only just a few cases that are involved, and most of those cases are in the oil shale lands of eastern Utah and western Colorado. That is all this bill refers to." Hearings on H. R. 6501 before the House Committee on Interior and Insular Affairs 3–4 (1956).

See also Hearings on H. R. 6501 before the Subcommittee on Mines and Mining of the House Committee on Interior and

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not addressed in the proposed legislation. H. R. Rep. No. 2537, 71st Cong., 3d Sess. (1931). The proposal was not enacted by the Congress.

Insular Affairs 4, 13–14, 16 (1956). The Reports of both Houses also evince a clear understanding that oil shale claimants stood to gain by the amendment:

> "Under the Department of the Interior decision in the case of James W. Bell . . . the owner of a valid mining claim located before February 25, 1920, on lands covered by the 1914 act, in order to obtain a patent to the minerals, is required to acquire the outstanding interest of the surface owner and thereafter to execute a deed of reconveyance to the United States. . . . From 1946 to 1955, inclusive, 71 mining claims, *including 67 oil shale claims,* were issued under this procedure. The committee is informed that in a few cases mining claimants have been unable to obtain the cooperation of the owners of the surface estate and have been prevented thereby from obtaining patent to the mineral estate." S. Rep. No. 2524, 84th Cong , 2d Sess., 2 (1956); H. R. Rep. No. 2198, 84th Cong., 2d Sess., 2 (1956) (emphasis added).

The bill was enacted into law without floor debate. Were we to hold today that oil shale is a nonvaluable mineral we would virtually nullify this 1956 action of Congress.

IV

The position of the Government in this case is not without a certain irony. Its challenge to respondents' pre-1920 oil shale claims as a "nonvaluable" comes at a time when the value of such claims has increased sharply as the Nation searches for alternative energy sources to meet its pressing needs. If the Government were to succeed in invalidating old claims and in leasing the lands at public auction, the Treasury, no doubt, would be substantially enriched. However, the history of the 1920 Mineral Leasing Act and developments subsequent to that Act persuade us that the Government cannot achieve that end by imposing a present marketability

requirement on oil shale claims.[11] We conclude that the original position of the Department of the Interior, enunciated in the 1920 Instructions and in *Freeman* v. *Summers*, is the correct view of the Mineral Leasing Act as it applies to the patentability of those claims.[12]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Oil shale was patentable under the general mining law from

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[11] This history indicates only that a present marketability standard does not apply to oil shale. It does not affect our conclusion in *United States* v. *Coleman* that for other minerals the Interior Department's profitability test is a permissible interpretation of the "valuable mineral" requirement. See n. 4, *supra*.

[12] The dissent overlooks the abundant evidence that Congress since 1920 has consistently viewed oil shale as a "valuable mineral" under the general mining law. The dissent dismisses the 1931 hearings and the 1956 Act as irrelevancies: as for the 1931 hearings, the dissent states that "not a single remark by a Senator or Representative" approved the *Freeman* standard; as for the 1956 Act, we are informed that Congress "dealt with [a] totally unrelated problem." *Post*, at 676. Neither of these observations is correct. The 1931 Senate hearings were called specifically to review the *Freeman* case for fear that another "Teapot Dome" scandal was brewing. Rarely has an administrative law decision received such exhaustive congressional scrutiny. And following that scrutiny, no action was taken to disturb the settled administrative practice; rather Senator Nye advised the Interior Department to continue patenting oil shale claims. Similarly, to characterize the 1956 Act as "totally unrelated" is to blink reality. The patentability of oil shale land was an essential predicate to that legislation; if oil shale land was nonpatentable then Congress performed a useless act.

The dissent also overlooks that beginning in 1920 and continuing for four decades, the Interior Department treated oil shale as a "valuable mineral." In paying deference to the doctrine that a "contemporaneous [administrative] construction . . . is entitled to substantial weight," *post*, at 676, the dissent ignores this contemporaneous administrative practice. The best evidence of the 1920 standard of patentability is the 1920 In-

1872 until 1920.[1] In 1920, Congress enacted the Mineral Leasing Act, 30 U. S. C. § 181 *et seq.* That legislation withdrew oil shale and certain other minerals from the general mining law, but preserved "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery." Act of Feb. 25, 1920, ch. 85, § 37, 41 Stat. 451, as amended, 30 U. S. C. § 193.

The question presented in this case is whether oil shale claims brought under this saving clause of the Mineral Leasing Act must satisfy the usual standards of patentability, or instead may be patented through the use of a "discovery" standard different from that which generally applies. The Court's answer is that a different and more relaxed standard is applicable. I disagree. Since I believe that pre-1920 oil shale claims must fulfill the then firmly established requirements of patentability for all valuable minerals under the general mining law, I respectfully dissent from the opinion and judgment of the Court.

A

There is not one shred of evidence that Congress enacted the saving clause of the Mineral Leasing Act with the purpose of exempting oil shale claims from the usual requirements of patentability. On its face, the 1920 version of the

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terior Department practice on the matter. The suggestion of the dissent that "future events [such] as market changes" were not meaningful data under the *Castle* v. *Womble* test, *post*, at 678, is inaccurate. As a leading treatise has observed, "[t]he future value concept of *Freeman* v. *Summers* is nothing more than the 'reasonable prospect of success' of *Castle* v. *Womble*, and the reference to 'present facts' in *Castle* v. *Womble* . . . relates to the existence of a vein or lode and not to its value." 1 Rocky Mountain Mineral Law Foundation, The American Law of Mining § 4.76, p. 697, n. 2 (1979).

[1] Rev. Stat. § 2319 *et seq.*, as amended, 30 U. S. C. § 22 *et seq.* See *Union Oil Co.* v. *Smith*, 249 U. S. 337, 345–346.

provision applied with identical effect to "coal, phosphate, sodium, oil, oil shale, and gas," and required that all outstanding valid claims to such minerals meet the existing standards of the mining law in order to be perfected.

Nothing in the Act's legislative history suggests anything to the contrary. Descriptions by legislators of the saving clause drew no distinction between oil shale and other covered claims. See, *e. g.*, 59 Cong. Rec. 2711–2712 (1920) (Rep. Taylor); 58 Cong. Rec. 7780–7781 (1919).[2] In the face of conflicting evidence on the subject, Congress may well have thought that many oil shale claims would meet the traditional criteria of patentability. But it did not accord such claims any special legislative treatment.

Equally unambiguous are the Instructions which the Secretary of the Interior published three months after passage of the Act. These expressly stated:

> "[L]ands valuable on account [of oil shale] must be held to have been subject to valid location and appropriation under the placer mining laws, *to the same extent and subject to the same provisions and conditions as if valuable on account of oil or gas.* Entries and applications for patent for oil shale placer claims will, therefore, be adjudicated . . . in accordance *with the same legal provisions and with reference to the same requirements and limitations as are applicable to oil and gas placers.*" 47 L. D. 548, 551 (1920) (emphasis added).

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[2] The Court's discussion of a 1919 attempt to substitute "deposits in paying quantities" for "valuable mineral" in a provision of the prospective Mineral Leasing Act, and Representative Sinott's response thereto, see *ante*, at 663–664, has absolutely nothing to do with the issue at hand. The attempted substitution concerned a provision of the prospective Act that set out the circumstances under which exploratory permits would be allowed for oil and gas deposits under the new leasing scheme. See 58 Cong. Rec. 7536–7537 (1919). Thus, the legislative discussion quoted by the Court did not involve oil shale, the requirements of the general mining law, or the Act's saving clause. See *id.*, at 7780–7781.

Such a contemporaneous construction of the statute by the agency charged with its application is entitled to substantial weight. See *United States* v. *National Assn. of Securities Dealers*, 422 U. S. 694, 719; *Udall* v. *Tallman*, 380 U. S. 1, 16.

B

The saving clause of the Mineral Leasing Act thus directs that the validity of all claims brought thereunder—including those relating to oil shale—must be judged according to the general criteria of patentability that were established in the mining law as of 1920. And I am convinced that nothing that Congress has done since 1920 can be read to have modified this mandate.

The Court points to congressional committee hearings that were held in 1931 on the Secretary's 1927 *Freeman* v. *Summers* decision, and notes that there resulted from this inquiry no legislative rejection of the Department's then prevailing generous treatment of oil shale claims. But of far greater significance, in my opinion, is the fact that not a single remark by a Senator or Representative, let alone by a congressional committee, can be found approving the liberal standard enunciated in *Freeman* v. *Summers*, 52 L. D. 201, even though such a statement could not, in any event, have overridden the plain meaning of the saving clause of the Mineral Leasing Act. See *TVA* v. *Hill*, 437 U. S. 153, 191–193; *SEC* v. *Sloan*, 436 U. S. 103, 121.

The Court purports to find support for its position in legislation enacted by Congress in 1956. But that legislation dealt with the totally unrelated problem of competing surface and mineral estates, and has nothing to do with the question at issue here. See Pub. L. 743, 70 Stat. 592; S. Rep. No. 2524, 84th Cong., 2d Sess. (1956); H. R. Rep. No. 2198, 84th Cong., 2d Sess. (1956).

The only reasonable inference that can be drawn from the events of 1931 and 1956 is that on those two occasions, as in 1920, Congress declined to assume that every pre-1920 oil

shale claim would turn out to be unpatentable. It seems to me wholly fallacious to interpret these indications of caution as a congressional intent to exempt oil shale claims from longstanding principles of patentability.

C

The respondents' patent applications were, I think, quite properly rejected at the administrative level for the simple reason that they failed to satisfy the requirements of the general mining law as of 1920. By 1920, the law was clear that a mineral land patent could issue only when the applicant had made a "discovery" of a "valuable mineral deposit." *Union Oil Co.* v. *Smith*, 249 U. S. 337, 346 (1919). Through departmental and judicial decisions, it had been further established that a "discovery" occurs only when minerals are found in such quantity and quality as to justify a prudent man to expend his labor and means with a reasonable prospect of success in developing a valuable mine. *Chrisman* v. *Miller*, 197 U. S. 313, 321–323 (1905); *H. H. Yard*, 38 L. D. 59, 70 (1909); *Castle* v. *Womble*, 19 L. D. 455, 457 (1894). See *Cameron* v. *United States*, 252 U. S. 450, 459 (1920); *Casey* v. *Northern Pacific R. Co.*, 15 L. D. 439, 440 (1892).

Of controlling significance here is the fact that, by 1920, two refinements of this "prudent man test" had occurred. First, it was clear that, although the patent applicant did not have to demonstrate that his mining efforts would definitely yield some profit,[3] he at least had to show that they probably would. *Cataract Gold Mining Co.*, 43 L. D. 248, 254 (1914). See *Cole* v. *Ralph*, 252 U. S. 286, 299 (1920); *Cameron* v. *United States*, *supra*, at 459; *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, 684 (1884).[4] Second,

[3] See *East Tintic Consolidated Mining Co.*, 43 L. D. 79, 81–82 (1914).

[4] See also *Royal K. Placer*, 13 L. D. 86, 89–90 (1891); *Tinkham* v. *McCaffrey*, 13 L. D. 517, 518 (1891). The authorities cited by the Court, *ante*, at 664, do not support a contrary rule. They state that an applicant

this required showing of probable profitability had to rest primarily on presently demonstrable, not speculative, fact. See *Davis's Administrator* v. *Weibbold*, 139 U. S. 507, 521–524 (1891); *Castle* v. *Womble*, *supra*, at 457 ("the requirement relating to discovery refers to present facts, and not to the probabilities of the future"); *Casey* v. *Northern Pacific R. Co.*, *supra*, at 440; *Winters* v. *Bliss*, 14 L. D. 59, 62 (1892). Thus, the applicant could not satisfy the applicable standard by pointing to such highly uncertain future events as market changes or technological advances in an attempt to demonstrate a reasonable prospect of success.

Each of these principles had developed rather naturally out of the "prudent man" rule of *Castle* v. *Womble*, *supra*. For land to be deemed "valuable" for mining purposes, and for a prudent man to decide to expend his time and money in developing a mine upon that land, it was quite rational to require a showing of a reasonable prospect that the mine would yield a profit. See *Cataract Gold Mining Co.*, *supra*, at 254. The Court is simply mistaken in suggesting that the general mining law was in any way otherwise in 1920.

D

With respect to the oil shale deposits at issue in this case, the Board of Land Appeals found that they "never have been a valuable mineral deposit within the meaning of the general

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for a mineral patent need not establish with certainty that a paying mine exists or can be developed on his land, but they do not in any way reject the rule of *Castle* v. *Womble*, 19 L. D. 455, 457 (1894), that the applicant must show that there exists a "reasonable prospect of success" in his developing a profitable mine. See *Cascaden* v. *Bartolis*, 146 F. 739, 741–742 (CA9 1906); *United States* v. *Ohio Oil Co.*, 240 F. 996, 998–1004 (Wyo. 1916); *Montana Cent. R. Co.* v. *Migeon*, 68 F. 811, 814–818 (CC Mont. 1895); *Book* v. *Justice Mining Co.*, 58 F. 106, 120, 123–125 (CC Nev. 1893); *Madison* v. *Octave Oil Co.*, 154 Cal. 768, 771–772, 99 P. 176, 178 (1908); 2 C. Lindley, American Law Relating to Mines and Mineral Lands § 336, pp. 768–773 (3d ed. 1914).

mining law." The Board based this conclusion on the following factual findings:

> "First, as a historical fact, the commercial production of oil from oil shale has never been competitive with the liquid petroleum industry. Second, the hypothetical studies [in the record] at best confirm that the commercial exploitation of oil shale would not be competitive with the liquid petroleum industry. Third, without exception, every oil shale operation that has been attempted in this country has failed to show profitable production. Fourth, [the respondents] have held these claims for half a century without attempting to exploit them.
>
> "It is unlikely that any oil shale operation could have operated at a profit at the time these claims were located or at any time up to and including the time of these contest proceedings. . . .
>
> . . . . .
>
> "In order for a commercially profitable operation to come into being there must be either a dramatic improvement in the technology or an alteration of the economic forces which have always operated in this country to prevent the commercial production of oil shale."

The Court of Appeals seemed to acknowledge that these findings were supported by substantial evidence, 591 F. 2d 597, 598–599, but thought that a different standard of patentability is applicable to oil shale claims, and today this Court agrees with that view.

For the reasons stated, I do not agree. Accordingly, I would set aside the judgment of the Court of Appeals.

AARON *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-66. Argued February 25, 1980—Decided June 2, 1980

Section 17 (a) of the Securities Act of 1933 (1933 Act) makes it unlawful for any person in the offer or sale of any security "(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact . . . , or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." Section 10 (b) of the Securities Exchange Act of 1934 (1934 Act) makes it unlawful to use, in connection with the purchase or sale of any security, "any manipulative or deceptive device or contrivance" in violation of such regulations as the Securities and Exchange Commission (SEC) may prescribe, and Rule 10b-5 was promulgated to implement this section. Section 20 (b) of the 1933 Act and § 21 (d) of the 1934 Act authorize the SEC to seek injunctive relief against violations of the respective Acts and further provide that, "upon a proper showing," a district court shall grant the injunction. Pursuant to §§ 20 (b) and 21 (d), the SEC filed a complaint in a District Court against petitioner, a managerial employee of a broker-dealer, alleging that he had violated, and aided and abetted violations of, § 17 (a) of the 1933 Act, § 10 (b) of the 1934 Act, and SEC Rule 10b-5, in connection with his firm's sales campaign for certain securities. Concluding that there was scienter on petitioner's part, the District Court found that he had committed and aided and abetted the violations as alleged. The Court of Appeals affirmed, declining to decide whether petitioner's conduct would support a finding of scienter and holding instead that when the SEC is seeking injunctive relief, proof of negligence alone will suffice.

Held: The SEC is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 10 (b) of the 1934 Act, Rule 10b-5, and § 17 (a) (1) of the 1933 Act, but need not establish scienter as an element of an action to enjoin violations of §§ 17 (a) (2) and 17 (a) (3) of the 1933 Act. Pp. 687-702.

(a) Scienter is an element of violations of § 10 (b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief

sought. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185. Section 10 (b)'s language, particularly the terms "manipulative," "device," and "contrivance," clearly refer to "knowing and intentional misconduct," and the section's legislative history also points toward a scienter requirement. *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180, distinguished. Pp. 689–695.

(b) Section 17 (a)(1)'s language, "to employ any device, scheme, or artifice to defraud," plainly evinces an intent on Congress' part to proscribe only knowing or intentional misconduct. By contrast, § 17 (a)(2)'s language, "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion of a scienter requirement. And § 17 (a)(3)'s language, "to engage in any transaction, practice, or course of business which *operates* or *would operate* as a fraud or deceit," plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible. Cf. *SEC* v. *Capital Gains Research Bureau*, *supra*. There is nothing in § 17 (a)'s legislative history to show a congressional intent contrary to the conclusion that scienter is thus required under § 17 (a)(1) but not under §§ 17 (a)(2) and 17 (a)(3). Pp. 695–700.

(c) The language and legislative history of §§ 20 (b) and 21 (d) both indicate that Congress intended neither to add to nor detract from the requisite showing of scienter under the substantive provisions at issue. Pp. 700–701.

605 F. 2d 612, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 702. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, and MARSHALL, JJ., joined, *post*, p. 703.

Barry M. Fallick argued the cause and filed briefs for petitioner.

Ralph C. Ferrara argued the cause for respondent. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Geller, Stephen M. Shapiro, Paul Gonson,* and *Jacob H. Stillman.**

*Briefs of *amici curiae* urging reversal were filed by *John M. Cannon* for the Mid-America Legal Foundation; by *Kenneth J. Bialkin* and *Louis*

MR. JUSTICE STEWART delivered the opinion of the Court.

The issue in this case is whether the Securities and Exchange Commission (Commission) is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17 (a) of the Securities Act of 1933 (1933 Act), § 10 (b) of the Securities Exchange Act of 1934 (1934 Act), and Commission Rule 10b–5 promulgated under that section of the 1934 Act.

I

When the events giving rise to this enforcement proceeding occurred, the petitioner was a managerial employee at E. L. Aaron & Co. (the firm), a registered broker-dealer with its principal office in New York City. Among other responsibilities at the firm, the petitioner was charged with supervising the sales made by its registered representatives and maintaining the so-called "due diligence" files for those securities in which the firm served as a market maker. One such security was the common stock of Lawn-A-Mat Chemical & Equipment Corp. (Lawn-A-Mat), a company engaged in the business of selling lawn-care franchises and supplying its franchisees with products and equipment.

Between November 1974 and September 1975, two registered representatives of the firm, Norman Schreiber and Donald Jacobson, conducted a sales campaign in which they repeatedly made false and misleading statements in an effort to solicit orders for the purchase of Lawn-A-Mat common stock. During the course of this promotion, Schreiber and Jacobson informed prospective investors that Lawn-A-Mat was planning or in the process of manufacturing a new type of small car and tractor, and that the car would be marketed within six weeks. Lawn-A-Mat, however, had no such plans. The two registered representatives also made projections of

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A. Craco for the American Institute of Certified Public Accountants; and by *Milton V. Freeman*, *Werner Kronstein*, and *Richard O. Scribner* for the Securities Industry Association.

substantial increases in the price of Lawn-A-Mat common stock and optimistic statements concerning the company's financial condition. These projections and statements were without basis in fact, since Lawn-A-Mat was losing money during the relevant period.

Upon receiving several complaints from prospective investors, an officer of Lawn-A-Mat informed Schreiber and Jacobson that their statements were false and misleading and requested them to cease making such statements. This request went unheeded.

Thereafter, Milton Kean, an attorney representing Lawn-A-Mat, communicated with the petitioner twice by telephone. In these conversations, Kean informed the petitioner that Schreiber and Jacobson were making false and misleading statements and described the substance of what they were saying. The petitioner, in addition to being so informed by Kean, had reason to know that the statements were false, since he knew that the reports in Lawn-A-Mat's due diligence file indicated a deteriorating financial condition and revealed no plans for manufacturing a new car and tractor. Although assuring Kean that the misrepresentations would cease, the petitioner took no affirmative steps to prevent their recurrence. The petitioner's only response to the telephone calls was to inform Jacobson of Kean's complaint and to direct him to communicate with Kean. Otherwise, the petitioner did nothing to prevent the two registered representatives under his direct supervision from continuing to make false and misleading statements in promoting Lawn-A-Mat common stock.

In February 1976, the Commission filed a complaint in the District Court for the Southern District of New York against the petitioner and seven other defendants in connection with the offer and sale of Lawn-A-Mat common stock. In seeking preliminary and final injunctive relief pursuant to § 20 (b) of the 1933 Act and § 21 (d) of the 1934 Act, the Commission alleged that the petitioner had violated and aided and abetted

violations of three provisions—§ 17 (a) of the 1933 Act, § 10 (b) of the 1934 Act, and Commission Rule 10b–5 promulgated under that section of the 1934 Act.[1] The gravamen of the charges against the petitioner was that he knew or had reason to know that the employees under his supervision were engaged in fraudulent practices, but failed to take adequate steps to prevent those practices from continuing. Before commencement of the trial, all the defendants except the petitioner consented to the entry of permanent injunctions against them.

Following a bench trial, the District Court found that the petitioner had violated and aided and abetted violations of § 17 (a), § 10 (b), and Rule 10b–5 during the Lawn-A-Mat sales campaign and enjoined him from future violations of these provisions.[2] The District Court's finding of past violations was based upon its factual finding that the petitioner had intentionally failed to discharge his supervisory responsibility to stop Schreiber and Jacobson from making statements to prospective investors that the petitioner knew to be false and misleading. Although noting that negligence alone might suffice to establish a violation of the relevant provisions in a Commission enforcement action, the District Court concluded that the fact that the petitioner "intentionally failed to terminate the false and misleading statements made by Schreiber and Jacobson, knowing them to be fraudulent, is sufficient to establish his scienter under the securities laws." As to the remedy, even though the firm had since gone bankrupt and the petitioner was no longer working for a broker-

[1] The Commission also charged the petitioner and three other defendants with violations of the registration provisions of §§ 5 (a), (c) of the 1933 Act, 15 U. S. C. §§ 77e (a), (c). The District Court found that the petitioner had violated these provisions and enjoined him from future violations. The Court of Appeals affirmed this holding, and the petitioner has not challenged this portion of the Court of Appeals' decision.

[2] The opinion of the District Court is reported in CCH Fed. Sec. L. Rep. ¶ 96,043 (1977).

dealer, the District Court reasoned that injunctive relief was warranted in light of "the nature and extent of the violations . . . , the [petitioner's] failure to recognize the wrongful nature of his conduct and the likelihood of the [petitioner's] repeating his violative conduct."

The Court of Appeals for the Second Circuit affirmed the judgment. 605 F. 2d 612. Declining to reach the question whether the petitioner's conduct would support a finding of scienter, the Court of Appeals held instead that when the Commission is seeking injunctive relief, "proof of negligence alone will suffice" to establish a violation of § 17 (a), § 10 (b), and Rule 10b–5. *Id.*, at 619. With regard to § 10 (b) and Rule 10b–5, the Court of Appeals noted that this Court's opinion in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, which held that an allegation of scienter is necessary to state a private cause of action for damages under § 10 (b) and Rule 10b–5, had expressly reserved the question whether scienter must be alleged in a suit for injunctive relief brought by the Commission. *Id.*, at 194, n. 12. The conclusion of the Court of Appeals that the scienter requirement of *Hochfelder* does not apply to Commission enforcement proceedings was said to find support in the language of § 10 (b), the legislative history of the 1934 Act, the relationship between § 10 (b) and the overall enforcement scheme of the securities laws, and the "compelling distinctions between private damage actions and government injunction actions."[3] For its holding that sci-

[3] The Court of Appeals observed that its previous decisions had required scienter in private damages actions under § 10 (b) even before this Court's decision in the *Hochfelder* case, but also had "uniformly . . . held that the language and history of the section [did] not require a showing of scienter in an injunction enforcement action brought by the Commission." 605 F. 2d, at 620–621. This distinction had been premised on the fact that the two types of suits under § 10 (b) advance different goals: actions for damages are designed to provide compensation to individual investors, whereas suits for injunctive relief serve to provide maximum protection for the investing public. In the present case, the Court of Appeals, relying on its

enter is not a necessary element in a Commission injunctive action to enforce § 17 (a), the Court of Appeals relied on its earlier decision in *SEC* v. *Coven*, 581 F. 2d 1020 (1978). There that court had noted that the language of § 17 (a) contains nothing to suggest a requirement of intent and that, in enacting § 17 (a), Congress had considered a scienter requirement, but instead "opted for liability without willfulness, intent to defraud, or the like." *Id.*, at 1027–1028.[4] Finally, the Court of Appeals affirmed the District Court's holding that, under all the facts and circumstances of this case, the Commission was entitled to injunctive relief. 605 F. 2d, at 623–624.

We granted certiorari to resolve the conflict in the federal courts as to whether the Commission is required to establish scienter—an intent on the part of the defendant to deceive, manipulate, or defraud[5]—as an element of a Commission enforcement action to enjoin violations of § 17 (a),[6] § 10 (b), and Rule 10b–5.[7] 444 U. S. 914.

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reasoning in previous cases, concluded that "[i]n view of the policy considerations underlying the securities acts, . . . the increased effectiveness of government enforcement actions predicated on a showing of negligence alone outweigh[s] the danger of potential harm to those enjoined from violating the securities laws." *Id.*, at 621.

[4] Neither the District Court nor the Court of Appeals gave any indication of which subsection or subsections of § 17 (a) of the 1933 Act the petitioner had violated.

[5] The term "scienter" is used throughout this opinion, as it was in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12, to refer to "a mental state embracing intent to deceive, manipulate, or defraud." We have no occasion here to address the question, reserved in *Hochfelder*, *ibid.*, whether, under some circumstances, scienter may also include reckless behavior.

[6] Compare, *e. g.*, the present case, and *SEC* v. *Coven*, 581 F. 2d 1020 (CA2 1978) (scienter not required in Commission enforcement action under §§ 17 (a) (1)–(3)), with *Steadman* v. *SEC*, 603 F. 2d 1126 (CA5 1979) (scienter required in Commission disciplinary action under § 17 (a) (1), but not under §§ 17 (a) (2)–(3)), and with *SEC* v. *Cenco Inc.*, 436

[*Footnote 7 is on p. 687*]

II

The two substantive statutory provisions at issue here are § 17 (a) of the 1933 Act, 48 Stat. 84, as amended, 15 U. S. C. § 77q (a), and § 10 (b) of the 1934 Act, 48 Stat. 891, 15 U. S. C. § 78j (b). Section 17 (a), which applies only to sellers, provides:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
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> "(1) to employ any device, scheme, or artifice to defraud, or
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> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 10 (b), which applies to both buyers and sellers, makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Pursuant to its rulemaking

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F. Supp. 193 (ND Ill. 1977) (scienter required in Commission enforcement action under §§ 17 (a) (1)–(3)).

[7] Compare, *e. g.*, the present case, and *SEC* v. *World Radio Mission, Inc.*, 544 F. 2d 535 (CA1 1976) (scienter not required in Commission enforcement action under § 10 (b) and Rule 10b–5), with *SEC* v. *Blatt*, 583 F. 2d 1325 (CA5 1978) (scienter required in Commission enforcement action under § 10 (b) and Rule 10b–5).

power under this section, the Commission promulgated Rule 10b–5, which now provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1979).

The civil enforcement mechanism for these provisions consists of both express and implied remedies. One express remedy is a suit by the Commission for injunctive relief. Section 20 (b) of the 1933 Act, 48 Stat. 86, as amended, as set forth in 15 U. S. C. § 77t (b), provides:

> "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this subchapter [*e. g.*, § 17 (a)], or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States . . . to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond."

Similarly, § 21 (d) of the 1934 Act, 48 Stat. 900, as amended, 15 U. S. C. § 78u (d), authorizes the Commission to seek injunctive relief whenever it appears that a person "is engaged or is about to engage in acts or practices constituting"

a violation of the 1934 Act (*e. g.*, § 10 (b)), or regulations promulgated thereto (*e. g.*, Rule 10b–5), and requires a district court "upon a proper showing" to grant injunctive relief.

Another facet of civil enforcement is a private cause of action for money damages. This remedy, unlike the Commission injunctive action, is not expressly authorized by statute, but rather has been judicially implied. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 196–197. Although this Court has repeatedly assumed the existence of an implied cause of action under § 10 (b) and Rule 10b–5, see *Ernst & Ernst* v. *Hochfelder*, *supra*; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730; *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 150–154; *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9, it has not had occasion to address the question whether a private cause of action exists under § 17 (a). See *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, at 733, n. 6.

The issue here is whether the Commission in seeking injunctive relief either under § 20 (b) for violations of § 17 (a), or under § 21 (d) for violations of § 10 (b) or Rule 10b–5, is required to establish scienter. Resolution of that issue could depend upon (1) the substantive provisions of § 17 (a), § 10 (b), and Rule 10b–5, or (2) the statutory provisions authorizing injunctive relief "upon a proper showing," § 20 (b) and § 21 (d). We turn to an examination of each to determine the extent to which they may require proof of scienter.

A

In determining whether scienter is a necessary element of a violation of § 10 (b) and Rule 10b–5, we do not write on a clean slate. Rather, the starting point for our inquiry is *Ernst & Ernst* v. *Hochfelder*, *supra*, a case in which the Court concluded that a private cause of action for damages will not lie under § 10 (b) and Rule 10b–5 in the absence of an allegation of scienter. Although the issue presented in the

present case was expressly reserved in *Hochfelder, supra,* at 193, n. 12, we nonetheless must be guided by the reasoning of that decision.

The conclusion in *Hochfelder* that allegations of simple negligence could not sustain a private cause of action for damages under § 10 (b) and Rule 10b–5 rested on several grounds. The most important was the plain meaning of the language of § 10 (b). It was the view of the Court that the terms "manipulative," "device," and "contrivance"—whether given their commonly accepted meaning or read as terms of art—quite clearly evinced a congressional intent to proscribe only "knowing or intentional misconduct." 425 U. S., at 197–199. This meaning, in fact, was thought to be so unambiguous as to suggest that "further inquiry may be unnecessary." *Id.,* at 201.

The Court in *Hochfelder* nonetheless found additional support for its holding in both the legislative history of § 10 (b) and the structure of the civil liability provisions in the 1933 and 1934 Acts. The legislative history, though "bereft of any explicit explanation of Congress' intent," contained "no indication . . . that § 10 (b) was intended to proscribe conduct not involving scienter." *Id.,* at 201–202. Rather, as the Court noted, a spokesman for the drafters of the predecessor of § 10 (b) described its function as a " 'catch-all clause to prevent manipulative devices.' " *Id.,* at 202. This description, as well as various passages in the Committee Reports concerning the evils to which the 1934 Act was directed, evidenced a purpose to proscribe only knowing or intentional misconduct. Moreover, with regard to the structure of the 1933 and 1934 Acts, the Court observed that in each instance in which Congress had expressly created civil liability, it had specified the standard of liability. To premise civil liability under § 10 (b) on merely negligent conduct, the Court concluded, would run counter to the fact that wherever Congress intended to accomplish that result, it said so expressly and subjected such actions to significant procedural restraints not applicable to § 10 (b).

Id., at 206–211. Finally, since the Commission's rulemaking power was necessarily limited by the ambit of its statutory authority, the Court reasoned that Rule 10b–5 must likewise be restricted to conduct involving scienter.[8]

In our view, the rationale of *Hochfelder* ineluctably leads to the conclusion that scienter is an element of a violation of § 10 (b) and Rule 10b–5, regardless of the identity of the plaintiff or the nature of the relief sought. Two of the three factors relied upon in *Hochfelder*—the language of § 10 (b) and its legislative history—are applicable whenever a violation of § 10 (b) or Rule 10b–5 is alleged, whether in a private cause of action for damages or in a Commission injunctive action under § 21 (d).[9] In fact, since *Hochfelder* involved an implied cause of action that was not within the contemplation of the Congress that enacted § 10 (b), *id.*, at 196, it would be quite anomalous in a case like the present one, involving as it does the express remedy Congress created for § 10 (b) violations, not to attach at least as much significance to the fact that the statutory language and its legislative history support a scienter requirement.

The Commission argues that *Hochfelder*, which involved a private cause of action for damages, is not a proper guide in construing § 10 (b) in the present context of a Commission enforcement action for injunctive relief. We are urged instead to look to *SEC* v. *Capital Gains Research Bureau*, 375 U. S.

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[8] The Court in *Hochfelder* also found support for its conclusion as to the scope of Rule 10b–5 in the fact that the administrative history revealed that "when the Commission adopted the Rule it was intended to apply only to activities that involved scienter." 425 U. S., at 212.

[9] The third factor—the structure of civil liability provisions in the 1933 and 1934 Acts—obviously has no applicability in a case involving injunctive relief. It is evident, however, that the third factor was not determinative in *Hochfelder*. Rather, the Court in *Hochfelder* clearly indicated that the language of the statute, which is applicable here, was sufficient, standing alone, to support the Court's conclusion that scienter is required in a private damages action under § 10 (b). *Id.*, at 201.

180. That case involved a suit by the Commission for injunctive relief to enforce the prohibition in § 206 (2) of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–6, against any act or practice of an investment adviser that "operates as a fraud or deceit upon any client or prospective client." The injunction sought in *Capital Gains* was to compel disclosure of a practice known as "scalping," whereby an investment adviser purchases shares of a given security for his own account shortly before recommending the security to investors as a long-term investment, and then promptly sells the shares at a profit upon the rise in their market value following the recommendation.

The issue in *Capital Gains* was whether in an action for injunctive relief for violations of § 206 (2) [10] the Commission must prove that the defendant acted with an intent to defraud. The Court held that a showing of intent was not required. This conclusion rested upon the fact that the legislative history revealed that the "Investment Advisers Act of 1940 . . . reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship,' as well as a congressional intent to eliminate, or at least to expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which

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[10] The statutory provision authorizing injunctive relief involved in the *Capital Gains* case was § 209 (e) of the Investment Advisors Act, 15 U. S. C. § 80b–9 (e), which provides in relevant part:

"Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, . . . it may in its discretion bring an action in the proper district court of the United States . . . to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, . . . a permanent or temporary injunction or decree or restraining order shall be granted without bond."

was not disinterested." 375 U. S., at 191–192 (footnote omitted). To require proof of intent, the Court reasoned, would run counter to the expressed intent of Congress.

The Court added that its conclusion was "not in derogation of the common law of fraud." *Id.*, at 192. Although recognizing that intent to defraud was a necessary element at common law to recover money damages for fraud in an arm's-length transaction, the Court emphasized that the Commission's action was not a suit for damages, but rather a suit for an injunction in which the relief sought was the "mild prophylactic" of requiring a fiduciary to disclose his transactions in stocks he was recommending to his clients. *Id.*, at 193. The Court observed that it was not necessary in a suit for "equitable or prophylactic relief" to establish intent, for "[f]raud has a broader meaning in equity [than at law] and intention to defraud or to misrepresent is not a necessary element." *Ibid.*, quoting W. De Funiak, Handbook of Modern Equity 235 (2d ed. 1956). Moreover, it was not necessary, the Court said, in a suit against a fiduciary such as an investment adviser, to establish all the elements of fraud that would be required in a suit against a party to an arm's-length transaction. Finally, the Court took cognizance of a "growing recognition by common-law courts that the doctrines of fraud and deceit which developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue." 375 U. S., at 194. Unwilling to assume that Congress was unaware of these developments at common law, the Court concluded that they "reinforce[d]" its holding that Congress had not sought to require a showing of intent in actions to enjoin violations of § 206 (2). *Id.*, at 195.

The Commission argues that the emphasis in *Capital Gains* upon the distinction between fraud at law and in equity should guide a construction of § 10 (b) in this suit for injunctive

relief.[11] We cannot, however, draw such guidance from *Capital Gains* for several reasons. First, wholly apart from its discussion of the judicial treatment of "fraud" at law and in equity, the Court in *Capital Gains* found strong support in the legislative history for its conclusion that the Commission need not demonstrate intent to enjoin practices in violation of § 206 (2). By contrast, as the Court in *Hochfelder* noted, the legislative history of § 10 (b) points towards a scienter requirement. Second, it is quite clear that the language in question in *Capital Gains*, "any . . . practice . . . which *operates* as a fraud or deceit," (emphasis added) focuses not on the intent of the investment adviser, but rather on the effect of a particular practice. Again, by contrast, the Court in *Hochfelder* found that the language of § 10 (b)—particularly the terms "manipulative," "device," and "contrivance"—clearly refers to "knowing or intentional misconduct." Finally, insofar as *Capital Gains* involved a statutory provision regulating the special fiduciary relationship between an investment adviser and his client, the Court there was dealing with a situation in which intent to defraud would not have been required even in a common-law action for money damages.[12]

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[11] The Commission finds further support for its interpretation of § 10 (b) as not requiring proof of scienter in injunctive proceedings in the fact that Congress was expressly informed of the Commission's interpretation on two occasions when significant amendments to the securities laws were enacted—the Securities Act Amendments of 1975, Pub. L. 94-29, 89 Stat. 97, and the Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494—and on each occasion Congress left the administrative interpretation undisturbed. See S. Rep. No. 94-75, p. 76 (1975); H. R. Rep. No. 95-640, p. 10 (1977). But, since the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of § 10 (b) so clearly at odds with its plain meaning and legislative history. See *SEC* v. *Sloan*, 436 U. S. 103, 119–121.

[12] The Court in *Capital Gains* concluded: "Thus, even if we were to agree with the courts below that Congress had intended, in effect, to

Section 10 (b), unlike the provision at issue in *Capital Gains*, applies with equal force to both fiduciary and nonfiduciary transactions in securities. It is our view, in sum, that the controlling precedent here is not *Capital Gains*, but rather *Hochfelder*. Accordingly, we conclude that scienter is a necessary element of a violation of § 10 (b) and Rule 10b–5.

B

In determining whether proof of scienter is a necessary element of a violation of § 17 (a), there is less precedential authority in this Court to guide us. But the controlling principles are well settled. Though cognizant that "Congress intended securities legislation enacted for the purpose of avoiding frauds to be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes,'" *Affiliated Ute Citizens* v. *United States*, 406 U. S., at 151, quoting, *SEC* v. *Capital Gains Research Bureau*, 375 U. S., at 195, the Court has also noted that "generalized references to the 'remedial purposes'" of the securities laws "will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.'" *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578, quoting, *SEC* v. *Sloan*, 436 U. S. 103, 116. Thus, if the language of a provision of the securities laws is sufficiently clear in its context and not at odds with the legislative history, it is unnecessary "to examine the additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 214, n. 33.

The language of § 17 (a) strongly suggests that Congress contemplated a scienter requirement under § 17 (a)(1), but

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codify the common law of fraud in the Investment Advisers Act of 1940, it would be logical to conclude that Congress codified the common law 'remedially' *as the courts had adapted it to the prevention of fraudulent securities transactions by fiduciaries*, not 'technically' as it has traditionally been applied in damage suits between parties to arm's-length transactions involving land and ordinary chattels." 375 U. S., at 195 (emphasis added).

not under § 17 (a)(2) or § 17 (a)(3). The language of § 17 (a)(1), which makes it unlawful "to employ any device, scheme, or artifice to defraud," plainly evinces an intent on the part of Congress to proscribe only knowing or intentional misconduct. Even if it be assumed that the term "defraud" is ambiguous, given its varied meanings at law and in equity, the terms "device," "scheme," and "artifice" all connote knowing or intentional practices.[13] Indeed, the term "device," which also appears in § 10 (b), figured prominently in the Court's conclusion in *Hochfelder* that the plain meaning of § 10 (b) embraces a scienter requirement.[14] *Id.*, at 199.

By contrast, the language of § 17 (a)(2), which prohibits any person from obtaining money or property "by means of any untrue statement of a material fact or any omission to state a material fact," is devoid of any suggestion whatsoever of a scienter requirement. As a well-known commentator has noted, "[t]here is nothing on the face of Clause (2) itself which smacks of *scienter* or intent to defraud." 3 L. Loss, Securities Regulation 1442 (2d ed. 1961). In fact, this Court in *Hochfelder* pointed out that the similar language of Rule 10b–5 (b) "could be read as proscribing . . . any type of material misstatement or omission . . . that has the effect of defrauding investors, whether the wrongdoing was intentional or not." 425 U. S., at 212.

Finally, the language of § 17 (a)(3), under which it is

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[13] Webster's International Dictionary (2d ed. 1934) defines (1) "device" as "[t]hat which is devised, or formed by design; a contrivance; an invention; project; scheme; often, a scheme to deceive; a stratagem; an artifice," (2) "scheme" as "[a] plan or program of something to be done; an enterprise; a project; as, a business *scheme*[, or a] crafty, unethical project," and (3) "artifice" as a "[c]rafty device; trickery; also, an artful stratagem or trick; artfulness; ingeniousness."

[14] In addition, the Court in *Hochfelder* noted that the term "to employ," which appears in both § 10 (b) and § 17 (a)(1), is "supportive of the view that Congress did not intend § 10 (b) to embrace negligent conduct." 425 U. S., at 199, n. 20.

unlawful for any person "to engage in any transaction, practice, or course of business which *operates* or *would operate* as a fraud or deceit," (emphasis added) quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible. This reading follows directly from *Capital Gains*, which attributed to a similarly worded provision in § 206 (2) of the Investment Advisers Act of 1940 a meaning that does not require a "showing [of] deliberate dishonesty as a condition precedent to protecting investors." 375 U. S., at 200.

It is our view, in sum, that the language of § 17 (a) requires scienter under § 17 (a)(1), but not under § 17 (a)(2) or § 17 (a)(3). Although the parties have urged the Court to adopt a uniform culpability requirement for the three subparagraphs of § 17 (a), the language of the section is simply not amenable to such an interpretation. This is not the first time that this Court has had occasion to emphasize the distinctions among the three subparagraphs of § 17 (a). In *United States* v. *Naftalin*, 441 U. S. 768, 774, the Court noted that each subparagraph of § 17 (a) "proscribes a distinct category of misconduct. Each succeeding prohibition is meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." (Footnote omitted.) Indeed, since Congress drafted § 17 (a) in such a manner as to compel the conclusion that scienter is required under one subparagraph but not under the other two, it would take a very clear expression in the legislative history of congressional intent to the contrary to justify the conclusion that the statute does not mean what it so plainly seems to say.

We find no such expression of congressional intent in the legislative history. The provisions ultimately enacted as § 17 (a) had their genesis in § 13 of identical bills introduced simultaneously in the House and Senate in 1933. H. R. 4314, 73d Cong., 1st Sess. (Mar. 29, 1933); S. 875, 73d Cong., 1st

Sess. (Mar. 29, 1933).[15] As originally drafted, § 13 would have made it unlawful for any person

> "willfully to employ any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise, or to engage in any transaction, practice, or course of business . . . which operates or would operate as a fraud upon the purchaser."

Hearings on these bills were conducted by both the House Interstate and Foreign Commerce Committee and the Senate Banking and Currency Committee.

The House and Senate Committees reported out different versions of § 13. The Senate Committee expanded its ambit by including protection against the intentionally fraudulent practices of a "dummy," a person holding legal or nominal title but under a moral or legal obligation to act for someone else. As amended by the Senate Committee, § 13 made it unlawful for any person

> "willfully to employ any device, scheme, or artifice or to employ any 'dummy', or to act as any such 'dummy', with the intent to defraud or to obtain money or property by means of any false pretense, representation, or promise, or to engage in any transaction, practice, or course of business . . . which operates or would operate as a fraud upon the purchaser. . . ."

See S. 875, 73d Cong., 1st Sess. (Apr. 27, 1933); S. Rep. No. 47, 73d Cong., 1st Sess., 4–5 (1933). The House Committee retained the original version of § 13, except that the word "willfully" was deleted from the beginning of the provision.[16] See H. R. 5480, 73d Cong., 1st Sess., § 16 (a) (May 4,

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[15] During the House hearings, H. R. 5480 was substituted for H. R. 4314. See H. R. 5480, 73d Cong., 1st Sess. (May 4, 1933).

[16] The House Committee also renumbered § 13 as § 16 (a), divided the provision into three subparagraphs, and modified the language of the

1933). It also rejected a suggestion that the first clause, "to employ any device, scheme, or artifice," be modified by the phrase, "with intent to defraud." See *ibid.*; Federal Securities Act: Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 146 (1933). The House and Senate each adopted the version of the provision as reported out by its Committee. The Conference Committee then adopted the House version with a minor modification not relevant here, see H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 12, 27 (1933), and it was later enacted into law as § 17 (a) of the 1933 Act.

The Commission argues that the deliberate elimination of the language of intent reveals that Congress considered and rejected a scienter requirement under all three clauses of § 17 (a). This argument, however, rests entirely on inference, for the Conference Report sheds no light on what the Conference Committee meant to do about the question of scienter under § 17 (a).[17] The legislative history thus gives rise to the equally plausible inference that the Conference Committee concluded that (1) in light of the plain meaning of § 17 (a)(1), the language of intent—"willfully" and "with intent to defraud"—was simply redundant, and (2) with regard to § 17 (a)(2) and § 17 (a)(3), a "willful[ness]" requirement was not to be included. It seems clear, therefore, that the

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second subparagraph in a manner not relevant here. See H. R. 5480, 73d Cong., 1st Sess., § 16 (a) (May 4, 1933).

[17] Although explaining that the "dummy" provision in the Senate bill was deleted from § 13 because it was substituted in modified form elsewhere in the statute, H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 27 (1933), the Conference Report contained no explanation of why the Conference Committee acquiesced in the decision of the House to delete the word "willfully" from § 13. That the Committee failed to explain why it followed the House bill in this regard is not in itself significant, since the Conference Report, by its own terms, purported to discuss only the "differences between the House bill and the substitute agreed upon by the conferees." *Id.*, at 24. The deletion of the word "willfully" was common to both the House bill and the Conference substitute.

legislative history, albeit ambiguous, may be read in a manner entirely consistent with the plain meaning of § 17 (a).[18] In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.[19]

C

There remains to be determined whether the provisions authorizing injunctive relief, § 20 (b) of the 1933 Act and § 21 (d) of the 1934 Act, modify the substantive provisions at issue in this case so far as scienter is concerned.

The language and legislative history of § 20 (b) and § 21 (d) both indicate that Congress intended neither to add to nor to detract from the requisite showing of scienter under the substantive provisions at issue. Sections 20 (b) and 21 (d) provide that the Commission may seek injunctive relief whenever it appears that a person "is engaged or [is] about to engage in any acts or practices" constituting a violation of the 1933 or 1934 Acts or regulations promulgated thereunder and that, "upon a proper showing," a district court shall grant the injunction. The elements of "a proper showing" thus include, at a minimum, proof that a person is engaged in or is about

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[18] The Commission, in further support of its view that scienter is not required under any of the subparagraphs of § 17 (a), points out that § 17 (a) was patterned upon New York's Martin Act, N. Y. Gen. Bus. Law §§ 352–353 (Consol. 1921), and that the New York Court of Appeals had construed the Martin Act as not requiring a showing of scienter as a predicate for injunctive relief by the New York Attorney General. *People* v. *Federated Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926). But, in the absence of any indication that Congress was even aware of the *Federated Radio* decision, much less that it approved of that decision, it cannot fairly be inferred that Congress intended to adopt not only the language of the Martin Act, but also a state judicial interpretation of that statute at odds with the plain meaning of the language Congress enacted as § 17 (a) (1).

[19] Since the language and legislative history of § 17(a) are dispositive, we have no occasion to address the "policy" arguments advanced by the parties. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 214, n. 33.

to engage in a substantive violation of either one of the Acts or of the regulations promulgated thereunder. Accordingly, when scienter is an element of the substantive violation sought to be enjoined, it must be proved before an injunction may issue. But with respect to those provisions such as § 17 (a) (2) and § 17 (a)(3), which may be violated even in the absence of scienter, nothing on the face of § 20 (b) or § 21 (d) purports to impose an independent requirement of scienter. And there is nothing in the legislative history of either provision to suggest a contrary legislative intent.

This is not to say, however, that scienter has no bearing at all on whether a district court should enjoin a person violating or about to violate § 17 (a)(2) or § 17 (a)(3). In cases where the Commission is seeking to enjoin a person "*about* to engage in any acts or practices which . . . *will* constitute" a violation of those provisions, the Commission must establish a sufficient evidentiary predicate to show that such future violation may occur. See *SEC* v. *Commonwealth Chemical Securities, Inc.*, 574 F. 2d 90, 98–100 (CA2 1978) (Friendly, J.); 3 L. Loss, Securities Regulation, at 1976. An important factor in this regard is the degree of intentional wrongdoing evident in a defendant's past conduct. See *SEC* v. *Wills*, 472 F. Supp. 1250, 1273–1275 (DC 1978). Moreover, as the Commission recognizes, a district court may consider scienter or lack of it as one of the aggravating or mitigating factors to be taken into account in exercising its equitable discretion in deciding whether or not to grant injunctive relief. And the proper exercise of equitable discretion is necessary to ensure a "nice adjustment and reconciliation between the public interest and private needs." *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329.

III

For the reasons stated in this opinion, we hold that the Commission is required to establish scienter as an element of a civil enforcement action to enjoin violations of § 17 (a)(1) of the 1933 Act, § 10 (b) of the 1934 Act, and Rule 10b–5

promulgated under that section of the 1934 Act. We further hold that the Commission need not establish scienter as an element of an action to enjoin violations of § 17 (a)(2) and § 17 (a)(3) of the 1933 Act. The Court of Appeals affirmed the issuance of the injunction in this case in the misapprehension that it was not necessary to find scienter in order to support an injunction under any of the provisions in question. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court and write separately to make three points:

(1) No matter what mental state § 10 (b) and § 17 (a) were to require, it is clear that the District Court was correct here in entering an injunction against petitioner. Petitioner was informed by an attorney representing Lawn-A-Mat that two representatives of petitioner's firm were making grossly fraudulent statements to promote Lawn-A-Mat stock. Yet he took no steps to prevent such conduct from recurring. He neither discharged the salesmen nor rebuked them; he did nothing whatever to indicate that such salesmanship was unethical, illegal, and should stop. Hence, the District Court's findings (a) that petitioner "intentionally failed" to terminate the fraud and (b) that his conduct was reasonably likely to repeat itself find abundant support in the record. In my view, the Court of Appeals could well have affirmed on that ground alone.

(2) I agree that § 10 (b) and § 17 (a)(1) require scienter but that § 17 (a)(2) and § 17 (a)(3) do not. I recognize, of course, that this holding "drives a wedge between [sellers and buyers] and says that henceforth only the seller's negligent misrepresentations may be enjoined." *Post*, at 715 (BLACKMUN, J., dissenting). But it is not this Court that "drives a

wedge"; Congress has done that. The Court's holding is compelled in large measure by *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), and gives effect to congressional intent as manifested in the language of the statutes and in their histories. If, as intimated, the result is "bad" public policy, that is the concern of Congress where changes can be made.

(3) It bears mention that this dispute, though pressed vigorously by both sides, may be much ado about nothing. This is so because of the requirement in injunctive proceedings of a showing that "there is a reasonable likelihood that the wrong will be repeated." *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1100 (CA2 1975). Accord, *SEC* v. *Keller Corp.*, 323 F. 2d 397, 402 (CA7 1963). To make such a showing, it will almost always be necessary for the Commission to demonstrate that the defendant's past sins have been the result of more than negligence. Because the Commission must show some likelihood of a future violation, defendants whose past actions have been in good faith are not likely to be enjoined. See opinion of the Court, *ante*, at 701. That is as it should be. An injunction is a drastic remedy, not a mild prophylactic, and should not be obtained against one acting in good faith.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in part and dissenting in part.

I concur in the Court's judgment that §§ 17 (a)(2) and (3) of the Securities Act of 1933, 15 U. S. C. §§ 77q (a)(2) and (3), do not require a showing of scienter for purposes of an action for injunctive relief brought by the Securities and Exchange Commission. I dissent from the remainder of the Court's reasoning and judgment. I am of the view that neither § 17 (a)(1) of the 1933 Act, 15 U. S. C. § 77q (a)(1), nor § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), as elaborated by SEC Rule 10b–5, 17 CFR § 240.10b–5 (1979), requires the Commission to prove scienter

before it can obtain equitable protection against deceptive practices in securities trading. Accordingly, I would affirm the judgment of the Court of Appeals in its entirety.

The issues before the Court in this case are important and critical. Sections 17 (a) and 10 (b) are the primary antifraud provisions of the federal securities laws. They are the chief means through which the Commission, by exercise of its authority to bring actions for injunctive relief, can seek protection against deception in the marketplace. See § 20 (b) of the 1933 Act, 15 U. S. C. § 77t (b); § 21 (d) of the 1934 Act, 15 U. S. C. § 78u (d). As a result, they are key weapons in the statutory arsenal for securing market integrity and investor confidence. See Douglas & Bates, The Federal Securities Act of 1933, 43 Yale L. J. 171, 182 (1933); Note, 57 Yale L. J. 1023 (1948). If the Commission is denied the ability effectively to nip in the bud the misrepresentations and deceptions that its investigations have revealed, honest investors will be the ones who suffer. Often they may find themselves stripped of their investments through reliance on information that the Commission knew was misleading but lacked the power to stop or contain.

Today's decision requires the Commission to prove scienter in many, if not most, situations before it is able to obtain an injunction. This holding unnecessarily undercuts the Commission's authority to police the marketplace. As I read the Court's opinion, it is little more than an extrapolation of the reasoning that was employed in *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), in imposing a scienter requirement upon private actions for damages implied under § 10 (b) and Rule 10b–5. Whatever the authority of *Hochfelder* may be in its own context, I perceive little reason to regard it as governing precedent here. I believe that there are sound reasons for distinguishing between private damages actions and public enforcement actions under these statutes, and for applying a scienter standard, if one must be applied anywhere, only in the former class of cases.

I

In keeping with the reasoning of *Hochfelder*, the Court places much emphasis upon statutory language and its assertedly plain meaning. The words "device, scheme, or artifice to defraud" in § 17 (a)(1), and the words "manipulative or deceptive device or contrivance" in § 10 (b), are said to connote "knowing or intentional misconduct." *Ante*, at 690, 696. And this connotation, it is said, implicitly incorporates the requirement of scienter traditionally applicable in the common law of fraud. But there are at least two specific responses to this wooden analysis. First, it is quite unclear that the words themselves call for so restrictive a definition. Second, as the Court recognized in *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963), the common-law requirement of scienter generally observed in actions for fraud at law was often dispensed with in actions brought before chancery.

A

The words of a statute, particularly one with a remedial object, have a " 'meaning imparted to them by the mischief to be remedied.' " *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 545 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U. S. 216, 221 (1936). Thus, antifraud provisions of securities legislation are to be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *SEC* v. *Capital Gains Research Bureau*, 375 U. S., at 195; *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 12 (1971); *Affiliated Ute Citizens* v. *United States*, 406 U. S. 128, 151 (1972). See also *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 350–351 (1943); *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 849–851 (1975). I have no doubt that the "mischief" confronting Congress in 1933 and 1934 included a large measure of intentional deceit and misrepresentation. The concern, however, ran deeper still, and Congress sought to develop a regulatory

framework that would ensure a free flow of honest, reliable information in the securities markets. This Court has recognized that it was Congress' desire "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*," and to place upon those in control of information the responsibility for misrepresentation. *SEC* v. *Capital Gains Research Bureau*, 375 U. S., at 186; see, *e. g.*, H. R. Rep. No. 85, 73d Cong., 1st Sess., 1–5 (1933); Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 71 (1933). This step was perceived as a fundamental prerequisite to restoration of investor confidence sorely needed after the market debacles that helped to plummet the Nation into a major economic depression. See *United States* v. *Naftalin*, 441 U. S. 768, 775 (1979).

Reading the language of § 17 (a)(1) and § 10 (b) with these purposes in mind, I am not at all certain—although the Court professes to be—that the language is incapable of being read to include misrepresentations that result from something less than willful behavior. The word "willfully," that Congress employed elsewhere in the securities laws when it wanted to specify a prerequisite of knowledge or intent, is conspicuously missing.[1] Instead, Congress employed a variety of

[1] The word "willfully" was originally included in the draft of what was to become § 17 (a) of the 1933 Act, and both Houses of Congress considered the addition of the phrase "with intent to defraud" to the language of that provision. That phrase ultimately was inserted by the Senate, but the bill that emerged from conference lacked either of the references to a state-of-mind requirement. See H. R. 4314, § 13, 73d Cong., 1st Sess. (Mar. 29, 1933); S. 875, § 13, 73d Cong., 1st Sess. (Apr. 27, 1933); H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 12, 26–27 (1933). The House bill, which as reported did not contain the words "willfully" and "intent to defraud," see H. R. 5480, § 16 (a), 73d Cong., 1st Sess. (May 4, 1933), was used by the conferees as their working draft. See Landis, The Legislative History of the Securities Act of 1933, 28 Geo. Wash. L. Rev. 29, 45 (1959).

The Court suggests that no meaning should be attributed to these events, because Congress never explained its reasons for deleting this

terms to describe the conduct that it authorized the Commission to prohibit. These operative terms are expressed in the disjunctive, and each should be given its separate meaning. Contrary to the Court's view, I would conclude that they identify a range of behavior, including but not limited to intentional misconduct, and that they admit an interpretation, in the context of Commission enforcement actions, that reaches deceptive practices whether the common-law condition of scienter is specifically present or not.

For example, the word "device" that is common to both statutes may have a far broader scope than the Court suggests. The legislative history of the 1934 Act used that term as a synonym for "practice," a word without any strong connotation of scienter, and it expressed a desire to confer upon the Commission authority under § 10 (b) to prohibit "any . . . manipulative or deceptive practices . . . detrimental to the interests of the investor." S Rep. No. 792, 73d Cong., 2d Sess., 18 (1934). The term "device" also was used in § 15

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explicit state-of-mind language. *Ante*, at 699–700. But the Conference Report, which discussed differences between the House bill and the Conference substitute, noted that the conferees had adopted from the Senate bill several "minor and clarifying changes" that were intended "to make clear and effective the administrative procedure provided for and to remove uncertainties" concerning the powers of the Commission. H. R. Conf. Rep. No. 152, 73d Cong., 1st Sess., 24 (1933). If the Court were correct in its interpretation of § 17 (a)(1), retention of the Senate's explicit state-of-mind language undoubtedly would have added clarity to congressional intent. In light of the other changes to which the House acceded, it is thus difficult, on the Court's theory, to understand why this change would not have been adopted as well. Moreover, Congress was well aware of the significance that addition or deletion of these terms would have. See 77 Cong. Rec. 2994 (1933) (colloquy between Sens. Fess and Fletcher); *id.*, at 2919 (remarks of Rep. Rayburn). It is also noteworthy that, when the 1934 Act was under consideration, a proposal was placed before Congress to amend § 17 (a) to limit it to conduct that was undertaken "willfully and with intent to deceive." 78 Cong. Rec. 8703 (1934). The proposal was voted down. *Id.*, at 8708.

(c)(1) of the Securities Exchange Act, 15 U. S. C. § 78*o* (c)(1), where it has been interpreted with congressional approval to apply to negligent acts and practices. See SEC Rule 15c–1–2, 17 CFR § 240.15c1–2 (1979); H. R. Rep. No. 2307, 75th Cong., 3d Sess., 10 (1938). Moreover, "device" had been given broad definition in prior enactments. In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 71 (1908), the Court rejected the contention that its meaning in the Elkins Act, 32 Stat. 847, should be limited to conduct involving resort to underhanded, dishonest, or fraudulent means.

In my view, this evidence provides a stronger indication of congressional understanding of the term "device" than the dictionary definition on which the Court relies. *Ante*, at 696, n. 13; cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 199, n. 20.[2] At the very least, it fully counters the Court's bald assertion that the meaning of terms used in the antifraud provisions is sufficiently "plain" that statutory policy and administrative interpretation may be ignored in defining the scope of the legislation. See *ante*, at 695, 700, n. 19. Division in the lower courts over the issues before us is itself an indication that reasonable minds differ over the import of the terminology that Congress has used. I can agree with the Court that the language of the statutes is the starting point of analysis, but at least in present circumstances I strongly disagree with the conclusion that it is the ending point as well.

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[2] I perceive no reason why the misrepresentations concerning Lawn-A-Mat Chemical & Equipment Corp. spread by petitioner's brokerage house would not qualify as a "device . . . to defraud," within the meaning of § 17 (a)(1), or as a "deceptive device" in contravention of Rule 10b–5, within the meaning of § 10 (b). I do not regard the word "deceptive," which focuses more on effect than on purpose, as adding significant connotations of scienter to the word "device." In light of the Court's disposition of this case, I shall not consider whether the misrepresentations might be reached under § 17 (a)(2) or § 17 (a)(3) as well, or whether the facts of the case establish scienter, as the District Court found.

B

An additional and independent ground for disagreement with the Court's analysis is its utter failure to harmonize statutory construction with prevailing equity practice at the time the securities laws were enacted. On prior occasions, the Court has emphasized the relevance of common-law principles in the interpretation of the antifraud provisions of the securities laws. See, *e. g.*, *Chiarella* v. *United States*, 445 U. S. 222, 227–229 (1980). See also *Lanza* v. *Drexel & Co.*, 479 F. 2d 1277, 1289–1291 (CA2 1973) (en banc). Yet in this case, the Court oddly finds those principles inapplicable. It specifically casts aside the fact that proof of scienter was not required in actions seeking equitable relief against fraudulent practices. This position stands in stark contrast with the Court's clear recognition of this separate equity tradition in *SEC* v. *Capital Gains Research Bureau*, 375 U. S. 180 (1963).

In *Capital Gains*, the Court was called upon to construe § 206 (2) of the Investment Advisers Act of 1940, 54 Stat. 847, as amended, 15 U. S. C. § 80b–6 (2). The statute is a general antifraud provision framed in language similar to that of § 17 (a)(3) of the 1933 Act. The Court of Appeals, sitting en banc, had decided by a close vote that the Commission could not obtain an injunction for violation of the statute unless it proved scienter. See *SEC* v. *Capital Gains Research Bureau*, 306 F. 2d 606 (CA2 1962). This Court, rejecting the view of the lower court that scienter was required in all cases involving fraud, reversed. It said:

> "The content of common-law fraud has not remained static as the courts below seem to have assumed. It has varied, for example, with the nature of the relief sought, the relationship between the parties, and the merchandise in issue. It is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages." 375 U. S., at 193.

In particular, the Court observed that proof of scienter was one element of an action for damages that the equity courts omitted. *Id.*, at 193–194. See also *Moore* v. *Crawford*, 130 U. S. 122, 128 (1889).

The Court does not now dispute the veracity of what it said in *Capital Gains*. Indeed, the different standards for fraud in law and at equity have been noted by commentators for more than a century. See, *e. g.*, 1 J. Story, Equity Jurisprudence §§ 186–187 (6th ed. 1853); G. Bower, The Law of Actionable Misrepresentation § 250 (1911); 2 J. Pomeroy, Equity Jurisprudence § 885 (4th ed. 1918); 3 S. Williston, The Law of Contracts § 1500 (1920); W. Walsh, Equity § 109, p. 509 (1930). See also Shulman, Civil Liability and the Securities Act, 43 Yale L. J. 227, 231 (1933). The difference originally may have been attributable more to historical accident than to any conscious policy. See Keeton, Actionable Misrepresentation: Legal Fault as a Requirement (Part I), 1 Okla. L. Rev. 21, 23 (1948). But as one commentator explained, it has survived because in equity "[i]t is not the *cause* but the *fact*, of injury, and the problem of its practical control through judicial action, which concern the court." 1 F. Lawrence, Substantive Law of Equity Jurisprudence § 13 (1929) (emphasis in original); see also *id.*, § 17. As a consequence of this different focus, common-law courts consistently have held that in an action for rescission or other equitable relief the fact of material misrepresentation is sufficient, and the knowledge or purpose of the wrongdoer need not be shown.

The Court purports to distinguish *Capital Gains* on the grounds that it involved a different statutory provision with somewhat different language, and that it stressed the confidential duties of investment advisers to their clients. *Ante*, at 693–695. These observations, in my view, do not weaken the relevance of the history on which the Court in *Capital Gains* relied. In fact, that history may be even more pertinent here. This case involves actual *dissemination* of material

false statements by a broker-dealer serving as market maker in the relevant security; *Capital Gains* involved an investment adviser's *omission* to state material facts. Because there was no affirmative misrepresentation in *Capital Gains*, the existence of a confidential duty arguably was necessary before the broker's silence could become the basis for a charge of fraud. Cf. *Chiarella* v. *United States*, 445 U. S., at 228. Here, in contrast, the fraudulent nature of the underlying conduct is clear, and the only issue is whether the Commission may obtain the desired prophylactic relief.

The significance of this common-law tradition, moreover, is buttressed by reference to state precursors of the federal securities laws. The problem of securities fraud was by no means new in 1933, and many States had attempted to deal with it by enactment of their own "blue-sky" statutes. When Congress turned to the problem, it explicitly drew from their experience. One variety of state statute, the so-called "fraud" laws of New York, New Jersey, Maryland, and Delaware, empowered the respective state attorneys general to bring actions for injunctive relief when fraudulent practices in the sale of securities were uncovered. See, *e. g.*, Federal Securities Act, Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 95 (1933). Of these statutes, the most prominent was the Martin Act of New York, 1921 N. Y. Laws, ch. 649, N. Y. Gen. Bus. Law §§ 352–353 (Consol. 1921), which had been fairly actively enforced. The drafters of the federal securities laws referred to these specific statutes as models for the power to seek injunctive relief that they requested for federal enforcement authorities. The experience of the State of New York, in particular, was repeatedly called to Congress' attention as an example for federal legislation to follow.[3]

[3] See, *e. g.*, Federal Securities Act, Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 11, 95, 109, 112 (1933); Securities Act: Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 71,

In light of this legislative history, I find it far more significant than does the Court that proof of scienter was not a prerequisite to relief under the Martin Act and other similar "blue-sky" laws. In *People* v. *Federated Radio Corp.*, 244 N. Y. 33, 154 N. E. 655 (1926), the New York Court of Appeals held that lack of scienter was no defense to Martin Act liability. The court justified this decision by looking to the traditional equity practice to which I have referred. It held:

> "[I]ntentional misstatements, as in an action at law to recover damages for fraud and deceit . . . need not be alleged. Material misrepresentations intended to influence the bargain, on which an action might be maintained in equity to rescind a consummated transaction, are enough." *Id.*, at 40–41, 154 N. E., at 658.

This decision was in keeping with the general tenor of state laws governing equitable relief in the context of securities transactions. See Note, 40 Yale L. J. 987, 988 (1931).

The Court dismisses all this evidence with the observation, *ante*, at 700, n. 18, that the specific holdings of cases like *Federated Radio* were not explicitly placed before Congress. Yet these were not isolated holdings or novel twists of law. They were part of an established, longstanding equity tradition the significance of which the Court has chosen simply to ignore. I am convinced that Congress was aware of this tradition, see n. 3, *supra*, and that if it had intended to depart from it, it would have left more traces of that intention than the Court has been able to find. Cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944) ("We are dealing here with the requirements of equity practice with a background of several hundred years of history").

146–147, 156, 170, 245–246, 253 (1933); see also 78 Cong. Rec. 8096 (1934). For a general discussion of state precursors and their consideration by Congress, see 1 L. Loss, Securities Regulation 33–34, 35–43 (2d ed. 1961).

II

Although I disagree with the Court's textual exegesis and its assessment of history, I believe its most serious error may be a failure to appreciate the structural interrelationship among equitable remedies in the 1933 and 1934 Acts, and to accord that interrelationship proper weight in determining the substantive reach of the Commission's enforcement powers under § 17 (a) and § 10 (b).

The structural considerations that were advanced in support of the decision to require proof of scienter in a private action for damages, see *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 206–211, have no application in the present context. In *Hochfelder*, the Court noted that Congress had placed significant limitations on the private causes of action for negligence that were available under provisions of the 1934 Act other than § 10 (b). *Ibid.* It concluded that the effectiveness of these companion statutes might be undermined if private plaintiffs sustaining losses from negligent behavior also could sue for damages under § 10 (b). *Id.*, at 210. Obviously, no such danger is created by Commission-initiated actions for injunctive relief, and the Court admits as much. *Ante*, at 691, n. 9.[4]

In fact, the consistent pattern in both the 1933 Act and the 1934 Act is to grant the Commission broad authority to seek enforcement without regard to scienter, unless criminal punishments are contemplated. In both Acts, state of mind is treated with some precision. Congress used terms such as

[4] Nor is there any danger that actions for prophylactic relief brought by the Commission will result in the "'broadening of the class of plaintiff who may sue in this area of the law,'" that has been an animating concern of the Court's decisions limiting the scope of private damages actions under § 10 (b). *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 214, n. 33 (1976), quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 747–748 (1975). Compare *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 179–180, 174 N. E. 441, 444 (1931), with *People* v. *Federated Radio Corp.*, 244 N. Y. 33, 154 N. E 655 (1926).

"knowing," "willful," and "good faith," when it wished to impose a state-of-mind requirement. The omission of such terms in statutory provisions authorizing the Commission to sue for injunctive relief contrasts sharply with their inclusion in provisions authorizing criminal prosecution. Compare § 20 (b) of the 1933 Act, 15 U. S. C. § 77t (b), and § 21 (d) of the 1934 Act, 15 U. S. C. § 78u (d), with § 24 of the 1933 Act, 15 U. S. C. § 77x, and § 32 (a) of the 1934 Act, 15 U. S. C. § 78ff (a). Moreover, the Acts create other civil remedies that may be pursued by the Commission that do not include state-of-mind prerequisites.[5] This pattern comports with Congress' expressed intent to give the Commission maximum flexibility to deal with new or unanticipated problems, rather than to confine its enforcement efforts within a rigid statutory framework. See, *e. g.*, H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6–7 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 5–6 (1934); 78 Cong. Rec. 8113 (1934).

The Court's decision deviates from this statutory scheme. That deviation, of course, is only partial. After today's decision, it still will be possible for the Commission to obtain relief against some negligent misrepresentations under § 17 (a) of the 1933 Act. Yet this halfway-house approach itself highlights the error of the Court's decision. Rule 10b–5 was promulgated to fill a gap in federal securities legislation, and

[5] The prohibition in § 5 of the 1933 Act, 15 U. S. C. § 77e, against selling securities without an effective registration statement has been interpreted to require no showing of scienter. See, *e. g.*, *SEC* v. *Spectrum, Ltd.*, 489 F. 2d 535, 541–542 (CA2 1973); *SEC* v. *North American Research & Development Corp.*, 424 F. 2d 63, 73–74 (CA2 1970). See also § 8 (b), 15 U. S. C. § 77h (b) (power to withhold registration effectiveness); § 8 (d), 15 U. S. C. § 77h (d) (power to issue "stop order" suspending registration effectiveness). The 1934 Act incorporated the culpability requirements for Commission remedies that the 1933 Act had established, although it did set a scienter standard for SEC remedies of criminal prosecution and administrative revocation of broker-dealer registrations. See Securities Exchange Act of 1934, Tit. II, § 210, 48 Stat. 908–909.

to apply to both purchasers and sellers under § 10 (b) the legal duties that § 17 (a) had applied to sellers alone. See *Ward La France Truck Corp.*, 13 S. E. C. 373, 381, n. 8 (1943); SEC Release No. 3230 (May 21, 1942). As the Commission thus recognized, the two statutes should operate in harmony. The Court now drives a wedge between them, and says that henceforth only the seller's negligent misrepresentations may be enjoined. I have searched in vain for any reason in policy or logic to support this division. Its only support, so far as I can tell, is to be found in the Court's technical linguistic analysis.

Many lower courts have refused to go so far. Both before and after *Hochfelder*, they have rejected the contention that the Commission must prove scienter under either § 17 (a) or § 10 (b) before it can obtain injunctive relief against deceptive practices.[6] Even those judges who anticipated *Hochfelder* by advocating a scienter requirement in private actions for money damages found no reason to place similar strictures on the Commission. See, *e. g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 866–868 (CA2 1968) (concurring opinion), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969), cited with approval in *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 197, 211, 213, 214.

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[6] For cases involving § 10 (b) see, *e. g.*, *SEC* v. *World Radio Mission*, 544 F. 2d 535, 541, n. 10 (CA1 1976); *SEC* v. *Management Dynamics, Inc.*, 515 F. 2d 801, 809 (CA2 1975); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1096 (CA2 1972); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 863 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969); *SEC* v. *Dolnick*, 501 F. 2d 1279, 1284 (CA7 1974); *SEC* v. *Geyser Minerals Corp.*, 452 F. 2d 876, 880–881 (CA10 1971). For cases involving § 17 (a) see, *e. g.*, *SEC* v. *World Radio Mission*, *supra*; *SEC* v. *Coven*, 581 F. 2d 1020, 1026 (CA2 1978), cert. denied, 440 U. S. 950 (1979); *SEC* v. *American Realty Trust*, 586 F. 2d 1001, 1006–1007 (CA4 1978); *SEC* v. *Van Horn*, 371 F. 2d 181, 185–186 (CA7 1966); *SEC* v. *Geyser Minerals Corp.*, *supra*. Because several of the latter cases turn on interpretations of § 17 (a) (2) or § 17 (a) (3), they do not necessarily conflict in result with today's decision.

The reasons for this refusal to limit the Commission's authority are not difficult to fathom. As one court observed in the context of § 17 (a), "[i]mpressive policies" support the need for Commission authority to seek prophylactic relief against misrepresentations that are caused by negligence, as well as those that are caused by deliberate swindling. *SEC* v. *Coven*, 581 F. 2d 1020, 1027 (CA2 1978), cert. denied, 440 U. S. 950 (1979). False and misleading statements about securities "can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar." *United States* v. *Benjamin*, 328 F. 2d 854, 863 (CA2), cert. denied *sub nom. Howard* v. *United States*, 377 U. S. 953 (1964). And when misinformation causes loss, it is small comfort to the investor to know that he has been bilked by negligent mistake rather than by fraudulent design, particularly when recovery of his loss has been foreclosed by this Court's decisions.[7] As the reported cases illustrate, injunctions against negligent dissemination of misinformation play an essential role in preserving market integrity and preventing serious financial loss.

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[7] When questioned about civil liability, the drafters of the 1933 Act strongly defended the theory that it would be preferable to place liability for negligent misstatements on the shoulders of those responsible for their dissemination rather than to require innocent investors to suffer in silence. Judge Alexander Holtzoff, then Special Assistant to the Attorney General of the United States, put it this way:

"Criminal liability is based only on knowingly making a false statement. But civil liability exists even in the case of an innocent mistake. Let us assume that an innocent mistake is made and an investor loses money because of it. Now, who should suffer? The man who loses the money or the man who puts the mistake in circulation knowing that other people will rely upon that mistaken statement?" Securities Act, Hearings on S. 875 before the Senate Committee on Banking and Currency, 73d Cong., 1st Sess., 207 (1933).

See also Federal Securities Act, Hearings on H. R. 4314 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 1st Sess., 124–125 (1933) (testimony of Ollie M. Butler, Foreign Service Division, Department of Commerce).

See, *e. g.*, *SEC* v. *World Radio Mission, Inc.*, 544 F. 2d 535, 540–541 (CA1 1976); *SEC* v. *Management Dynamics, Inc.*, 515 F. 2d 801, 809 (CA2 1975); *SEC* v. *Manor Nursing Centers, Inc.*, 458 F. 2d 1082, 1095–1097 (CA2 1972).[8]

III

I thus arrive at the conclusion that statutory language does not compel the judgment reached by the Court, while considerations of history, statutory structure, legislative purpose, and policy all strongly favor an interpretation of § 17 (a) and § 10 (b) that permits the Commission to seek injunctive relief without first having to prove scienter. In my view, this conclusion is fortified by the fact that Congress has approved it in a related context.[9] Because I find nothing

[8] In recognition of the importance to the investing public of the Commission's authority to prevent negligent misstatements, the proposed Federal Securities Code drafted by the American Law Institute provides the Commission with power to obtain injunctions preventing deception and misrepresentation without proof of scienter. ALI, Federal Securities Code §§ 262 (d), 297 (a), 1602 (a), 1819 (a)(3), 1819 (a)(4) (Prop. Off. Draft 1978). The ALI Code has been approved by the American Bar Association, 65 A. B. A. J. 341 (1979).

[9] In 1975, Congress undertook relatively substantial revision of the securities laws. Securities Acts Amendments of 1975, Pub. L. 94–29, 89 Stat. 97; see Securities Acts Amendments of 1975: Hearings on S. 249 before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 1st Sess., 1 (1975). In the course of its deliberations, Congress had occasion to consider the scope of Commission injunctive remedies. In reliance on the different purposes of Commission enforcement proceedings and private actions, Congress enacted § 21 (g) of the Act, 15 U. S. C. § 78u (g), which provides that, absent consent from the Commission, private actions may not be consolidated with Commission proceedings. The Senate Committee in charge of the legislation observed that Commission enforcement actions and private suits for damages, though both civil in nature, "are very different," and it explained that private suits involve complications that are not present when the Commission seeks injunctive relief:

"Private actions frequently will involve more parties and more issues than the Commission's enforcement action, thus greatly increasing the

whatever in either *Ernst & Ernst* v. *Hochfelder* or today's decision that compels a different result, I dissent.

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need for extensive pretrial discovery. In particular, issues related to . . . scienter, causation, and the extent of damages, are elements *not* required to be demonstrated in a Commission injunctive action." S. Rep. No. 94–75, p. 76 (1975) (emphasis in original).

In 1977, following the decision in *Ernst & Ernst* v. *Hochfelder*, Congress re-examined the Commission's enforcement authority, this time in connection with the Foreign Corrupt Practices Act of 1977, Pub. L. 95–213, 91 Stat. 1494. Case law was discussed in some detail, and express approval was given to judicial decisions holding that scienter was not required when the SEC sought injunctive relief under Rule 10b–5. The responsible Committee in the House of Representatives declared:

"In the context of an SEC action to enjoin future violations of the securities laws, a defendant's state of mind should make no difference. The harm to the public is the same regardless of whether or not the violative conduct involved scienter. Because an SEC enforcement action is designed to protect the public against the recurrence of violative conduct, and not to punish a state of mind, this Committee intends that scienter is not an element of any Commission enforcement proceeding." H. R. Rep. No. 95–640, p. 10 (1977).

As expressions of later Congresses, these statements, of course, do not control the meaning of provisions enacted in 1933 and 1934. Yet the views of a subsequent Congress are entitled to some weight, particularly when that Congress undertakes significant revision of the statute but leaves the disputed provision intact. Cf., *e. g.*, *Andrus* v. *Allard*, 444 U. S. 51, 59, n. 10 (1979); *United States* v. *Rutherford*, 442 U. S. 544, 553–554 (1979); *Board of Governors* v. *First Lincolnwood Corp.*, 439 U. S. 234, 248 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974).

Syllabus

SUPREME COURT OF VIRGINIA ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

No. 79–198. Argued February 19, 1980—Decided June 2, 1980

Appellant Virginia Supreme Court, which claims inherent authority to regulate and discipline attorneys, also has statutory authority to do so. Pursuant to these powers, the court promulgated the Virginia Code of Professional Responsibility (Code) and organized the Virginia State Bar to act as an administrative agency of the court to report and investigate violations of the Code. The statute reserves to the state courts the sole power to adjudicate alleged violations of the Code, and the Supreme Court and other state courts of record have independent authority on their own to initiate proceedings against attorneys. When one of the appellees sought to prepare a legal services directory, the attorneys who were canvassed refused to supply the requested information for fear of violating the Code's prohibition against attorney advertising (DR 2–102 (A)(6)). Appellees then brought an action in Federal District Court under 42 U. S. C. § 1983 against, *inter alios*, the Virginia Supreme Court and its chief justice (also an appellant) in both his individual and official capacities, seeking a declaration that the defendants had violated appellees' First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning the attorneys involved, and a permanent injunction against the enforcement and operation of DR 2–102 (A)(6). Ultimately, after the Virginia Supreme Court declined to amend DR 2–102 (A)(6) despite the State Bar's recommendation to do so and despite the intervening decision in *Bates* v. *State Bar of Arizona*, 433 U. S. 350, holding that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise fees charged for certain routine legal services, the District Court declared DR 2–102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it. The court further held that the Civil Rights Attorney's Fees Awards Act of 1976, which provides that in any action to enforce 42 U. S. C. § 1983, *inter alia*, a district court, in its discretion, may award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, authorized in proper circumstances

the award of fees against the Virginia Supreme Court and the chief justice in his official capacity, and that here such an award was not unjust because the Supreme Court had denied the State Bar's petition to amend the Code and had also failed to amend it to conform to the holding in *Bates, supra.*

Held:

1. In promulgating the Code, the Virginia Supreme Court acts in a legislative capacity, and in that capacity the court and its members are immune from suit. Pp. 731–734.

2. But the court and its chief justice were properly held liable in their enforcement capacities. Since the state statute gives the court independent authority on its own to initiate proceedings against attorneys, the court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies are. Pp. 734–737.

3. The District Court abused its discretion in awarding attorney's fees against the Virginia Supreme Court premised on acts or omissions for which appellants enjoy absolute legislative immunity. There is nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute immunity. Pp. 737–739.

470 F. Supp. 1055, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

Marshall Coleman, Attorney General of Virginia, argued the cause for appellants. With him on the briefs were *Walter H. Ryland,* Chief Deputy Attorney General, and *Philip B. Kurland.*

Ellen Broadman argued the cause for appellees. With her on the brief were *Alan Mark Silbergeld, James W. Benton, Jr.,* and *Michael Pollet.**

**Burt Neuborne, Bruce J. Ennis, Jr.,* and *Stephen Bricker* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises questions of whether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from suit in an action brought under 42 U. S. C. § 1983 challenging the Virginia Court's disciplinary rules governing the conduct of attorneys and whether attorney's fees were properly awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, against the Virginia Court and its chief justice in his official capacity.

I

It will prove helpful at the outset to describe the role of the Virginia Court in regulating and disciplining attorneys. The Virginia Court has firmly held to the view that it has inherent authority to regulate and discipline attorneys. *Button* v. *Day*, 204 Va. 547, 552–555, 132 S. E. 2d 292, 295–298 (1963). It also has statutory authority to do so. Section 54–48 of the Code of Virginia (1978) authorizes the Virginia Court to "promulgate and amend rules and regulations . . . [p]rescribing a code of ethics governing the professional conduct of attorneys-at-law. . . ."[1]

Pursuant to these powers, the Virginia Court promulgated the Virginia Code of Professional Responsibility (State Bar Code, Bar Code, or Code), the provisions of which were sub-

[1] "§ 54–48. Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and disciplinary procedure.—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

"(a) Defining the practice of law.

"(a1) Prescribing procedure for limited practice of law by third-year law students.

"(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

"(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys-at-law."

stantially identical to the American Bar Association's Code of Professional Responsibility. Section 54–48 provides no standards for the Virginia Court to follow in regulating attorneys; it is apparent that insofar as the substantive content of such a code is concerned, the State has vested in the court virtually its entire legislative or regulatory power over the legal profession.

Section 54–48 also authorizes the Virginia Court to prescribe "procedure for disciplining, suspending and disbarring attorneys-at-law"; and § 54–49 authorizes the court to promulgate rules and regulations "organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting . . . violation[s] . . . ." [2] Acting under this authority, the Virginia State Bar (State Bar or Bar) has been organized and its enforcement role vested in an ethics committee and in various district committees. Section 54–51 reserves to the courts the sole power to adjudicate alleged violations of the Bar Code,[3] and hence the role of the State Bar is limited to the

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[2] "§ 54–49. Organization and government of Virginia State Bar.—The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

[3] "§ 54–51. Restrictions as to rules and regulations.—Notwithstanding the foregoing provisions of this article, the Supreme Court shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys-at-law, which shall be inconsistent with any statute; nor shall it adopt or promulgate any rule or regulation or method of procedure which shall eliminate the jurisdiction of the Courts to deal with the discipline of attorneys-at-law as provided by law; and in no case shall an attorney, who demands to be tried by a court of

investigation of violations and the filing of appropriate complaints in the proper courts. Under § 54–74, the enforcement procedure involves the filing of a complaint in a court of record, the issuance of a rule to show cause against the charged attorney, the prosecution of the case by the commonwealth attorney, and the hearing of the case by the judge issuing the rule together with two other judges designated by the chief justice of the Virginia Supreme Court.[4] Appeal lies to the Virginia Supreme Court.

The courts of Virginia, including the Supreme Court, thus

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competent jurisdiction for the violation of any rule or regulation adopted under this article be tried in any other manner."

[4] "§ 54–74. Procedure for suspension or revocation of license.—(1) *Issuance of rule.*—If the Supreme Court of Virginia, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, be made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

"(2) *Judges hearing case.*—At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the State treasury, from the appropriation for criminal charges.

"(3) *Duty of Commonwealth's attorney.*—It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

"(4) *Action of court.*—Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked,

play an adjudicative role in enforcing the Bar Code similar to their function in enforcing any statute adopted by the Virginia Legislature and similar or identical to the role they would play had the Bar Code been adopted by the state legislature.

The Virginia Court, however, has additional enforcement power. As we have said, it asserts inherent power to discipline attorneys. Also, § 54–74 expressly provides that if the Virginia Court or any other court of record observes any act of unprofessional conduct, it may itself, without any complaint being filed by the State Bar or by any third party, issue a rule to show cause against the offending attorney. Although once the rule issues, such cases would be prosecuted by the commonwealth attorney, it is apparent that the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

II

This case arose when, in 1974, one of the appellees, Consumers Union of the United States, Inc. (Consumers Union), sought to prepare a legal services directory designed to assist consumers in making informed decisions concerning utilization of legal services. Consumers Union sought to canvass all

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or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

"(5) *Appeal.*—The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Virginia, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal."

Effective July 1, 1981, the judge issuing the rule to show cause will not participate in disciplinary cases, which are to be heard by three judges designated by the chief justice from any circuit other than the one in which the case is pending.

attorneys practicing law in Arlington County, Va., asking for information concerning each attorney's education, legal activities, areas of specialization, office location, fee and billing practices, business and professional affiliations, and client relations. However, it encountered difficulty because lawyers declined to supply the requested information for fear of violating the Bar Code's strict prohibition against attorney advertising. Rule 2–102 (A)(6) of the Code prohibited lawyers from being included in legal directories listing the kind of legal information that Consumers Union sought to publish.[5]

On February 27, 1975, Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U. S. C. § 1983 against the Virginia Court, the Virginia State Bar, the American Bar Association, and, in both their individual and official capacities, the chief justice of the Virginia Court, the president of the State Bar, and the chairman

[5] At the time Consumers Union sought to canvass Virginia attorneys, Disciplinary Rule 2–102 (A) of the State Bar Code provided in pertinent part: "A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

. . . . . .

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice . . . ; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented."

of the State Bar's Legal Ethics Committee. With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code. Plaintiffs sought a declaration that defendants had violated their First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning attorneys practicing in Arlington County, and a permanent injunction against the enforcement and operation of DR 2–102 (A)(6).

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.). Defendants moved for indefinite continuance of the trial on the grounds that the ABA and the State Bar were preparing amendments to relax the advertising prohibitions contained in DR 2–102 (A)(6). Over plaintiff-appellees' opposition, the District Court granted defendants a continuance until March 25, 1976.

On February 17, 1976, the ABA adopted amendments to its Code of Professional Responsibility which would permit attorneys to advertise office hours, initial consultation fees, and credit arrangements. Defendants then sought and obtained a further continuance to permit the Virginia Court and the State Bar to consider amending the State Bar Code to conform to the ABA amendments. Although the governing body of the State Bar recommended that the Virginia Court adopt the ABA amendments to DR 2–102, on April 20, 1976, the court declined to adopt the amendments on the ground that they would "not serve the best interests of the public or the legal profession."

The action then proceeded to trial on May 17, 1976, and was decided on December 17, 1976. *Consumers Union of United States, Inc.* v. *American Bar Assn.*, 427 F. Supp. 506 (ED Va. 1976). The three-judge District Court concluded that abstention would be inappropriate in light of defendants' failure to amend the State Bar Code despite continuances based on the speculation that DR 2–102 (A)(6) would be

relaxed. *Id.*, at 513–516. The court declared that DR 2–102 (A)(6) unconstitutionally restricted the right of plaintiff-appellees to receive and gather nonfee information and information concerning initial consultation fees. Defendants were permanently enjoined from enforcing DR 2–102 (A)(6) save for its prohibition against advertising fees for services other than the initial consultation fee. *Id.*, at 523.

Plaintiff-appellees appealed to this Court, challenging the District Court's refusal to enjoin enforcement of the prohibition of fee advertising. Defendants brought a cross-appeal, arguing that DR 2–102 (A)(6) should have been upheld in its entirety. While these appeals were pending, we decided *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977), in which we held that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise the fees they charged for certain routine legal services. In light of *Bates*, the judgment below was vacated and the case was remanded for further consideration. 433 U. S. 917 (1977).

On remand, defendants agreed that in light of *Bates* DR 2–102 (A)(6) could not constitutionally be enforced to prohibit attorneys from providing plaintiff-appellees with any of the information they sought to publish in their legal services directory. Defendants proposed that a permanent injunction be entered barring them from enforcing DR 2–102 (A)(6) against attorneys providing plaintiff-appellees with information. On May 8, 1979, the District Court declared DR 2–102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it.[6]

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[6] The District Court's final order provided in pertinent part:

"1. The publication described in plaintiff's complaint, as amended, is declared valid and constitutionally protected;

"2. The Virginia Code of Professional Responsibility Disciplinary Rule 2–102 (A)(6) is declared unconstitutional on its face;

"3. The defendants, their successors in office, their agents and attorneys and all acting in concert therewith are permanently enjoined from enforce-

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Plaintiff-appellees also moved for costs, including an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988.[7] The defendants objected to any fee award on various grounds, including judicial immunity. They did not object to their paying other costs. Although holding the individual defendants immune from attorney's fees liability in their individual capacities, the District Court held that the Act authorized in proper circumstances the award of fees against the State Bar, the Virginia Court and the individual defendants in their official capacities. *Consumers Union of United States, Inc.* v. *American Bar Assn.*, 470 F. Supp. 1055, 1059–1061 (ED Va. 1979).

The District Court went on to conclude that special circumstances made it unjust to award attorney's fees against the State Bar or against the State Bar officers in their official capacities because it was not these defendants but the Virginia Court that had the power to change the State Bar disciplinary rules and because the State Bar and its officers had unsuccessfully sought to persuade the court to amend the Code to conform to what they deemed to be constitutional standards. There were no similar circumstances making it unjust to award attorney's fees against the Virginia Court and its chief justice in his official capacity. This was because the court had denied the State Bar's petition to amend the Code to conform to what were deemed to be the requirements of *Bigelow* v. *Virginia*, 421 U. S. 809 (1975), and had also failed to amend the Code to conform to the holding in *Bates* v. *State Bar of Arizona*, *supra*. Hence, "[i]t would hardly be unjust to order the

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ment of Virginia Code of Professional Responsibility Disciplinary Rule 2–102 (A)(6)."

[7] The Civil Rights Attorney's Fees Awards Act was enacted into law on October 19, 1976, five months after the trial in this action and two months before the District Court's initial decision. The Act is applicable in this case because Congress intended for the Act to apply to actions that were pending when the Act was passed. *Hutto* v. *Finney*, 437 U. S. 678, 694–695, n. 23 (1978).

Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend [the Code] to conform with constitutional requirements." 470 F. Supp., at 1063. The parties were directed to attempt to reach an agreement on a reasonable sum, failing which the court would determine the fee.[8]

On May 23, 1979, defendants filed a petition for rehearing, arguing for the first time, on judicial immunity grounds, that the Virginia Court and its chief justice were exempt from having declaratory and injunctive relief entered against them. It was also argued that in any event it was an abuse of discretion to enter the fee award against the Virginia Court and its chief justice.

Following denial of rehearing, the Virginia Court and its chief justice appealed, presenting the following questions:

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
4. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

Appellees moved to dismiss or affirm, the motion to dismiss urging that the claim of judicial immunity from declaratory or injunctive relief was not properly before the Court be-

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[8] Judge Warriner dissented on the grounds that legislative immunity barred an award of attorney's fees and that it would be unjust to award attorney's fees against a state supreme court in the absence of a showing of bad faith. 470 F. Supp., at 1063.

cause it had not been timely raised in the District Court and had therefore been waived. We noted probable jurisdiction, 444 U. S. 914 (1979).

III

Title 42 U. S. C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The District Court held that in light of the § 1983 judgment that had been entered in favor of appellees, the Act authorized an award of attorney's fees against appellants. Appellants urge that this was error. Their primary contention is that on the grounds of absolute legislative or judicial immunity they should have been excluded from the judgment below and also from liability for attorney's fees. Appellees on the other hand assert that neither judicial nor legislative immunity immunized these defendants from declaratory or injunctive relief as distinguished from a damages award; and in any event they insist that the judgment stand against these defendants because the Virginia Court itself shares direct enforcement authority with the State Bar and hence is subject to prospective judgments just as other enforcement officials are.[9]

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[9] As indicated in the text, the motion to dismiss the appeal rested on the failure of appellants to have raised the immunity issue at an earlier time. We noted probable jurisdiction, and appellees' brief on the merits has not again urged that the claim of immunity was not timely raised either with respect to the fee question alone or with respect to the entry of prospective relief against the Virginia Court and its chief justice. Their arguments, like those of appellants, are centered on the issues of judicial and legislative immunity.

A

Appellees sought declaratory and injunctive relief with respect to particular provisions of the State Bar Code propounded by the Virginia Court. Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking. The District Court below referred to the issuance of the Code as a judicial function, but this is not conclusive upon us for the purpose of deciding whether issuance of the Code is a judicial act entitled to immunity under § 1983. Judge Warriner, dissenting in the District Court, agreed with a prior District Court holding in *Hirschkop* v. *Virginia State Bar,* 421 F. Supp. 1137, 1156 (ED Va. 1976), rev'd in part on other grounds *sub nom. Hirschkop* v. *Snead,* 594 F. 2d 356 (CA4 1979), that in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity. Judge Warriner said:

> "Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature." 470 F. Supp., at 1064.

We agree with this analysis and hence must inquire whether the Virginia Court and its chief justice are immune from suit for acts performed in their legislative capacity.

We have already decided that the Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages. *Eastland* v. *United States Servicemen's Fund,* 421 U. S. 491, 502–503 (1975). The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. *Ibid.* To preserve legislative independence, we have concluded that

"legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney* v. *Brandhove*, [341 U. S. 367, 376 (1951)], should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967).

We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). In *Tenney* we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or injunctive relief.[10] In holding that § 1983 "does not create

[10] This seems to be the view of the Court of Appeals for the Second Circuit in its recent holding in *Star Distributors, Ltd.* v. *Marino*, 613 F. 2d 4 (1980). That court held that the legislative immunity enjoyed by the members of a state legislative committee bars an action for declaratory and injunctive relief just as it bars an action for damages. Understanding that *Tenney* was based on the similarity between common-law immunity and the Speech or Debate Clause, the Second Circuit reasoned that legislative immunity should protect state legislators in a manner similar to the protection afforded Congressmen. The Courts of Appeals for the Fifth and Eighth Circuits have dismissed on immunity grounds suits seeking both damages and injunctive relief but without separately addressing the issue of immunity from prospective relief. *Safety Harbor* v. *Birchfield*, 529 F. 2d 1251 (CA5 1976); *Smith* v. *Klecker*, 554 F. 2d 848 (CA8 1977); *Green* v. *DeCamp*, 612 F. 2d 368 (CA8 1980). The Court of Appeals for the Fourth Circuit, however, takes the contrary view and rejects the notion that the legislative immunity enjoyed by state officials bars suits for prospective relief. *Jordan* v. *Hutcheson*, 323 F. 2d 597 (1963); *Eslinger* v. *Thomas*, 476 F. 2d 225, 230 (1973). Both opinions of the Court of Appeals for the Fourth Circuit, however, were rendered prior to this Court's decision in *Eastland* v. *United States Servicemen's Fund*, 421 U. S. 491 (1975). The Court of Appeals for the Ninth Circuit may have a similar view with respect to the immunity enjoyed by officials of a regional body exercising both legislative and executive powers. *Jacobson* v. *Tahoe Regional Planning Agency*, 566 F. 2d 1353 (1977).

civil liability" for acts unknown "in a field where legislators traditionally have power to act," *id.*, at 379, we did not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland* v. *United States Servicemen's Fund, supra,* at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States* v. *Gillock,* 445 U. S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution. *Eastland* v. *United States Servicemen's Fund, supra,* at 502–503, 505, 506; *Dombrowski* v. *Eastland, supra,* at 84–85; *United States* v. *Johnson,* 383 U. S. 169, 180 (1966); *Tenney* v. *Brandhove, supra,* at 377–379.[11] Thus, there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could

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[11] Contrary to appellees' suggestion, we do not view *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U. S. 391 (1979), as indicating our approval of injunctive relief against a regional legislative body or its officers. No injunctive relief had been awarded when *Lake Country Estates* reached this Court. Although it is not entirely clear, the Court of Appeals in that case seemed to believe that immunity would not bar a suit for equitable relief against officials of the Tahoe Regional Planning Agency (TRPA). The court did not specify whether equitable relief could be founded on acts for which the officials would otherwise enjoy legislative immunity, and this Court did not have occasion to express any view on this question because the TRPA never challenged this aspect of the Court of Appeals' decision. We simply affirmed the Court of Appeals' holding that TRPA officials could not be held liable in damages for their legislative acts.

successfully have sought dismissal on the grounds of absolute legislative immunity.[12]

Appellees submit that whatever may be true of state legislators, the Virginia Court and its members should not be accorded the same immunity where they are merely exercising a delegated power to make rules in the same manner that many executive and agency officials wield authority to make rules in a wide variety of circumstances. *All* of such officials, it is urged, are not absolutely immune from civil suit. As much could be conceded, but it would not follow that, as appellees would have it, in *no* circumstances do those who exercise delegated legislative power enjoy legislative immunity. In any event, in this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.

B

If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley* v. *Fisher*, 13 Wall. 335 (1872), we have held that judges defending against § 1983

[12] Of course, legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy.

actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Stump* v. *Sparkman*, 435 U. S. 349 (1978). However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief;[13] we have not addressed the question.[14]

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[13] The Courts of Appeals for the Second, Fourth, and Seventh Circuits are of the view that judicial immunity does not extend to declaratory and injunctive relief. *Heimbach* v. *Village of Lyons*, 597 F. 2d 344, 347 (CA2 1979); *Timmerman* v. *Brown*, 528 F. 2d 811, 814 (CA4 1975); *Fowler* v. *Alexander*, 478 F. 2d 694, 696 (CA4 1973); *Harris* v. *Harvey*, 605 F. 2d 330, 335, n. 7 (CA7 1979); *Hansen* v. *Ahlgrimm*, 520 F. 2d 768, 769 (CA7 1975); *Jacobson* v. *Schaefer*, 441 F. 2d 127, 130 (CA7 1971). Three other Courts of Appeals, the Eighth, Ninth, and District of Columbia Circuits seem to agree. *Kelsey* v. *Fitzgerald*, 574 F. 2d 443, 444 (CA8 1978); *Williams* v. *Williams*, 532 F. 2d 120, 121–122 (CA8 1976); *Shipp* v. *Todd*, 568 F. 2d 133, 134 (CA9 1978); *Briggs* v. *Goodwin*, 186 U. S. App. D. C. 179, 184, n. 4, 569 F. 2d 10, 15, n. 4 (1977). It is rare, however, that any kind of relief has been entered against judges in actions brought under § 1983 and seeking to restrain or otherwise control or affect the future performance of their adjudicative role. Such suits have been recurringly dismissed for a variety of reasons other than immunity. Hence, the question of awarding attorney's fees against judges will not often arise.

[14] Although we did not address the issue, a state judge was among the defendants in *Mitchum* v. *Foster*, 407 U. S. 225 (1972), where the Court held that § 1983 served to pierce the shield of 28 U. S. C. § 2283 against a federal court enjoining state-court proceedings. The Court did say, quoting from *Ex parte Virginia*, 100 U. S. 339, 346 (1880), to this effect, that § 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative, or *judicial*. The Court also noted that the proponents of § 1983 at the time it was enacted insisted that state courts were being used to harass and injure citizens, perhaps because they were powerless to stop deprivations

We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54–74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were.[15]

Prosecutors enjoy absolute immunity from damages liability, *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975),

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or were in league with those who were bent upon abrogating federally protected rights. 407 U. S., at 242.

In *Boyle* v. *Landry*, 401 U. S. 77 (1971), and *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), lower courts had entered injunctions against state officials including state-court judges. In each case, we reversed on the grounds that no case or controversy had been made out against any of the appellants in this Court; and in *O'Shea*, we concluded that even assuming that there was a case or controversy, insufficient grounds for equitable relief had been presented. We did not suggest, however, that judges were immune from suit in their judicial capacity.

Gerstein v. *Pugh*, 420 U. S. 103 (1975), involved a judgment against state-court judges and a prosecuting official declaring unconstitutional and enjoining the enforcement of certain state statutes. The prosecutor brought the case to this Court. We affirmed the declaration that the Florida procedures at issue were unconstitutional and held that *Younger* v. *Harris*, 401 U. S. 37 (1971), did not bar injunctive relief in the circumstances of the case. No issue of absolute immunity was raised or addressed.

[15] Of course, as *Boyle* v. *Landry*, *supra*, and *O'Shea* v. *Littleton*, *supra*, indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person* v. *Association of the Bar of New York*, 554 F. 2d 534, 536–537 (CA2 1977).

is only one of a myriad of such cases since *Ex parte Young*, 209 U. S. 123 (1908), decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case.[16]

IV

Because appellees properly prevailed in their § 1983 action, the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, authorized the District Court, "in its discretion," to award them "a reasonable attorney's fee," which may be recovered from state officials sued in their official capacities. *Hutto* v. *Finney*, 437 U. S. 678, 694 (1978). Applying the standard of *Newman* v. *Piggie Park Enterprises*, 390 U. S. 400, 402 (1968), the District Court indicated that attorney's fees should ordinarily be awarded " 'unless special circumstances would render such an award unjust.' " 470 F. Supp., at 1061.[17]

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[16] Although appellants argued below that the Virginia Court as an entity is not a "person" suable under § 1983, they have not raised this issue before this Court. In any event, prospective relief was properly awarded against the chief justice in his official capacity; and absent a valid claim of immunity, the question remains whether the District Court's award of attorney's fees was proper. Although we would not have appellate jurisdiction under 28 U. S. C. § 1253 to decide the attorney's fees question had it alone been appealed, because the case is properly here on the § 1983 issue we have jurisdiction to decide the attorney's fees issue. Cf. *Rosado* v. *Wyman*, 397 U. S. 397, 404–405 (1970).

[17] The District Court derived this standard from the Senate Committee Report on the Civil Rights Attorney's Fees Awards Act, which stated:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [the

Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees. The District Court nevertheless considered it unjust to require the State Bar defendants to pay attorney's fees because they had recommended that the State Bar Code be amended to conform to what the Bar thought our cases required and because the Virginia Court declined or failed to adopt this proposal. No similar circumstances excused the Virginia Court, the court held, for it was the very authority that had propounded and failed to amend the challenged provisions of the Bar Code.

We are unable to agree that attorney's fees should have been awarded for the reasons relied on by the District Court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the District Court's award of attorney's fees in this case was premised on acts or omissions for which appellants enjoyed absolute legislative immunity. This was error.

We held in *Hutto* v. *Finney*, *supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity. There is no similar indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly

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Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968)." S. Rep. No. 94–1011, p. 4 (1976).

awarded against defendants who would be immune from damages awards, H. R. Rep. No. 94–1558, p. 9 (1976), but there is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief. Because the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role. However, we hold that it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court. We therefore vacate the award of attorney's fees and remand for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

WALKER *v.* ARMCO STEEL CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 78-1862. Argued January 8, 1980—Decided June 2, 1980

An Oklahoma statute provides that an action shall not be deemed to be "commenced" for purposes of the statute of limitations until service of summons on the defendant, but further provides (§ 97) that if the complaint is filed within the limitations period the action is deemed to have commenced from the date of that filing if the plaintiff serves the defendant within 60 days, even though such service occurs outside the limitations period. Federal Rule of Civil Procedure 3 provides that a civil action is commenced by filing a complaint. In this case, petitioner's personal injury action, based on diversity of citizenship, was brought against respondent in Federal District Court in Oklahoma, and, although the complaint was filed within Oklahoma's 2-year statute of limitations, service on respondent was not effectuated until after the 2-year limitation period and the 60-day service period specified in § 97 had expired. The District Court dismissed the complaint as barred by the Oklahoma statute of limitations, holding that § 97 was an integral part of such statute and that therefore under *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, state law, not Rule 3, applied. The Court of Appeals affirmed.

Held: The action is barred by the Oklahoma statute of limitations. *Ragan, supra.* Pp. 744–753.

(a) The scope of Rule 3 is not sufficiently broad to control the issue before the District Court. *Hanna* v. *Plumer,* 380 U. S. 460, distinguished. There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations. In diversity actions, Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations. Pp. 748–751.

(b) In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice to, the defendant is an integral part of the policies (establishment of a deadline after which the defendant may legitimately have peace of mind, and recognition that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim) served by the statute of limitations. Rule 3

does not replace such policy determinations found in state law, and that Rule and § 97 can exist side by side, each controlling its own intended sphere of coverage without conflict. Pp. 751–752.

(c) Although in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an inequitable administration of the law. There is no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. Pp. 752–753.

592 F. 2d 1133, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Don Manners argued the cause and filed a brief for petitioner.

Jay M. Galt argued the cause and filed a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the issue whether in a diversity action the federal court should follow state law or, alternatively, Rule 3 of the Federal Rules of Civil Procedure in determining when an action is commenced for the purpose of tolling the state statute of limitations.

I

According to the allegations of the complaint, petitioner, a carpenter, was injured on August 22, 1975, in Oklahoma City, Okla., while pounding a Sheffield nail into a cement wall. Respondent was the manufacturer of the nail. Petitioner claimed that the nail contained a defect which caused its head to shatter and strike him in the right eye, resulting in permanent injuries. The defect was allegedly caused by respondent's negligence in manufacture and design.

Petitioner is a resident of Oklahoma, and respondent is a foreign corporation having its principal place of business in a

State other than Oklahoma. Since there was diversity of citizenship, petitioner brought suit in the United States District Court for the Western District of Oklahoma. The complaint was filed on August 19, 1977. Although summons was issued that same day,[1] service of process was not made on respondent's authorized service agent until December 1, 1977.[2] On January 5, 1978, respondent filed a motion to dismiss the complaint on the ground that the action was barred by the applicable Oklahoma statute of limitations. Although the complaint had been filed within the 2-year statute of limitations, Okla. Stat., Tit. 12, § 95 (1971),[3] state law does not deem the action "commenced" for purposes of the statute of limitations until service of the summons on the defendant,

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[1] The Court of Appeals stated that summons was issued the following day, August 20. See 592 F. 2d 1133, 1134 (CA10 1979). However, the docket sheet in the District Court indicates that summons was issued August 19. See App. insert preceding p. A–1. Nothing turns on this difference.

[2] The record does not indicate why this delay occurred. The face of the process record shows that the United States Marshal acknowledged receipt of the summons on December 1, 1977, and that service was effectuated that same day. *Id.*, at A–5. At oral argument counsel for petitioner stated that the summons was found "in an unmarked folder in the filing cabinet" in counsel's office some 90 days after the complaint had been filed. Tr. of Oral Arg. 3. See also *id.*, at 6. Counsel conceded that the summons was not delivered to the Marshal until December 1. *Id.*, at 3–4. It is unclear why the summons was placed in the filing cabinet. See *id.*, at 17.

[3] Under Oklahoma law, a suit for products liability, whether based on a negligence theory or a breach of implied warranty theory, is governed by the 2-year statute of limitations period of Okla. Stat., Tit. 12, § 95 (1971). See *Hester* v. *Purex Corp.*, 534 P. 2d 1306, 1308 (Okla. 1975); *O'Neal* v. *Black & Decker Manufacturing Co.*, 523 P. 2d 614, 615 (Okla. 1974); *Kirkland* v. *General Motors Corp.*, 521 P. 2d 1353, 1361 (Okla. 1974). The period begins to run from the date of injury. *O'Neal* v. *Black & Decker Manufacturing Co., supra*, at 615; *Kirkland* v. *General Motors Corp., supra*, at 1361.

Okla. Stat., Tit. 12, § 97 (1971).[4] If the complaint is filed within the limitations period, however, the action is deemed to have commenced from that date of filing if the plaintiff serves the defendant within 60 days, even though that service may occur outside the limitations period. *Ibid.* In this case, service was not effectuated until long after this 60-day period had expired. Petitioner in his reply brief to the motion to dismiss admitted that his case would be foreclosed in state court, but he argued that Rule 3 of the Federal Rules of Civil Procedure governs the manner in which an action is commenced in federal court for all purposes, including the tolling of the state statute of limitations.[5]

The District Court dismissed the complaint as barred by the Oklahoma statute of limitations. 452 F. Supp. 243 (1978). The court concluded that Okla. Stat., Tit. 12, § 97 (1971) was "an integral part of the Oklahoma statute of limitations," 452 F. Supp., at 245, and therefore under *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530 (1949), state law applied. The court rejected the argument that *Ragan* had been implicitly overruled in *Hanna* v. *Plumer*, 380 U. S. 460 (1965).

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[4] Oklahoma Stat., Tit. 12, § 97 (1971), provides in pertinent part: "An action shall be deemed commenced, within the meaning of this article [the statute of limitations], as to each defendant, at the date of the summons which is served on him, or on a codefendant, who is a joint contractor or otherwise united in interest with him. . . . An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this article, when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons, . . . within sixty (60) days."

[5] Petitioner also argued in his reply brief to the motion to dismiss that respondent should have relied on Federal Rule of Civil Procedure 41—dismissal for failure to prosecute—rather than the state statute of limitations. Respondent in its response to the reply brief argued that a Rule 41 argument was implicit in its motion to dismiss. Neither the District Court nor the Court of Appeals addressed this issue.

The United States Court of Appeals for the Tenth Circuit affirmed. 592 F. 2d 1133 (1979). That court concluded that Okla. Stat., Tit. 12, § 97 (1971), was in "direct conflict" with Rule 3. 592 F. 2d, at 1135. However, the Oklahoma statute was "indistinguishable" from the statute involved in *Ragan*, and the court felt itself "constrained" to follow *Ragan*. 592 F. 2d, at 1136.

We granted certiorari, 444 U. S. 823 (1979), because of a conflict among the Courts of Appeals.[6] We now affirm.

II

The question whether state or federal law should apply on various issues arising in an action based on state law which has been brought in federal court under diversity of citizenship jurisdiction has troubled this Court for many years. In the landmark decision of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), we overturned the rule expressed in *Swift* v. *Tyson*, 16 Pet. 1 (1842), that federal courts exercising diversity jurisdiction need not, in matters of "general jurisprudence," apply the nonstatutory law of the State. The Court noted

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[6] Compare case below; *Rose* v. *K. K. Masutoku Toy Factory Co.*, 597 F. 2d 215 (CA10 1979); *Lindsey* v. *Dayton-Hudson Corp.*, 592 F. 2d 1118, 1121–1123 (CA10), cert. denied, 444 U. S. 856 (1979); *Witherow* v. *Firestone Tire & Rubber Co.*, 530 F. 2d 160, 163–166 (CA3 1976); *Anderson* v. *Papillion*, 445 F. 2d 841 (CA5 1971) (*per curiam*); *Groninger* v. *Davison*, 364 F. 2d 638 (CA8 1966); *Sylvester* v. *Messler*, 351 F. 2d 472 (CA6 1965) (*per curiam*), cert. denied, 382 U. S. 1011 (1966), all holding that state law controls, with *Smith* v. *Peters*, 482 F. 2d 799 (CA6 1973), cert. denied, 415 U. S. 989 (1974), and *Sylvestri* v. *Warner & Swasey Co.*, 398 F. 2d 598 (CA2 1968), holding that Rule 3 controls. See also *Ingram* v. *Kumar*, 585 F. 2d 566, 568 (CA2 1978) (reaffirming *Sylvestri*), cert. denied, 440 U. S. 940 (1979); *Prashar* v. *Volkswagen of America, Inc.*, 480 F. 2d 947 (CA8 1973) (distinguishing *Ragan*), cert. denied *sub nom. Volkswagenwerk Aktiengesellschaft* v. *Prashar*, 415 U. S. 994 (1974); *Chappell* v. *Rouch*, 448 F. 2d 446 (CA10 1971) (distinguishing *Ragan*). See generally *Walko Corp.* v. *Burger Chef Systems, Inc.*, 180 U. S. App. D. C. 306, 308–311, 554 F. 2d 1165, 1167–1170 (1977) (dicta).

that "[d]iversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State," *Erie R. Co.* v. *Tompkins, supra,* at 74. The doctrine of *Swift* v. *Tyson* had led to the undesirable results of discrimination in favor of noncitizens, prevention of uniformity in the administration of state law, and forum shopping. 304 U. S., at 74–75. In response, we established the rule that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity] case is the law of the State," *id.,* at 78.

In *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945), we addressed ourselves to "the narrow question whether, when no recovery could be had in a State court because the action is barred by the statute of limitations, a federal court in equity can take cognizance of the suit because there is diversity of citizenship between the parties," *id.,* at 107. The Court held that the *Erie* doctrine applied to suits in equity as well as to actions at law. In construing *Erie* we noted that "[i]n essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." 326 U. S., at 109. We concluded that the state statute of limitations should be applied. "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Id.,* at 110.

The decision in *York* led logically to our holding in *Ragan* v. *Merchants Transfer & Warehouse Co., supra.* In *Ragan,* the plaintiff had filed his complaint in federal court on September 4, 1945, pursuant to Rule 3 of the Federal Rules of

Civil Procedure. The accident from which the claim arose had occurred on October 1, 1943. Service was made on the defendant on December 28, 1945. The applicable statute of limitations supplied by Kansas law was two years. Kansas had an additional statute which provided: "An action shall be deemed commenced within the meaning of [the statute of limitations], as to each defendant, at the date of the summons which is served on him. . . . An attempt to commence an action shall be deemed equivalent to the commencement thereof within the meaning of this article when the party faithfully, properly and diligently endeavors to procure a service; but such attempt must be followed by the first publication or service of the summons within sixty days." Kan. Gen. Stat. § 60–308 (1935). The defendant moved for summary judgment on the ground that the Kansas statute of limitations barred the action since service had not been made within either the 2-year period or the 60-day period. It was conceded that had the case been brought in Kansas state court it would have been barred. Nonetheless, the District Court held that the statute had been tolled by the filing of the complaint. The Court of Appeals reversed because "the requirement of service of summons within the statutory period was an integral part of that state's statute of limitations." *Ragan*, 337 U. S., at 532.

We affirmed, relying on *Erie* and *York*. "We cannot give [the cause of action] longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co.* v. *Tompkins*." 337 U. S., at 533–534. We rejected the argument that Rule 3 of the Federal Rules of Civil Procedure governed the manner in which an action was commenced in federal court for purposes of tolling the state statute of limitations. Instead, we held that the service of summons statute controlled because it was an integral part of the state statute of limitations, and under *York* that statute of limitations was part of the state-law cause of action.

Ragan was not our last pronouncement in this difficult area, however. In 1965 we decided *Hanna* v. *Plumer*, 380 U. S. 460, holding that in a civil action where federal jurisdiction was based upon diversity of citizenship, Rule 4 (d)(1) of the Federal Rules of Civil Procedure, rather than state law, governed the manner in which process was served. Massachusetts law required in-hand service on an executor or administrator of an estate, whereas Rule 4 permits service by leaving copies of the summons and complaint at the defendant's home with some person "of suitable age and discretion." The Court noted that in the absence of a conflicting state procedure, the Federal Rule would plainly control, 380 U. S., at 465. We stated that the "outcome-determination" test of *Erie* and *York* had to be read with reference to the "twin aims" of *Erie:* "discouragement of forum-shopping and avoidance of inequitable administration of the laws." 380 U. S., at 468. We determined that the choice between the state in-hand service rule and the Federal Rule "would be of scant, if any, relevance to the choice of a forum," for the plaintiff "was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served." *Id.*, at 469 (footnote omitted). This factor served to distinguish that case from *York* and *Ragan*. See 380 U. S., at 469, n. 10.

The Court in *Hanna*, however, pointed out "a more fundamental flaw" in the defendant's argument in that case. *Id.*, at 469. The Court concluded that the *Erie* doctrine was simply not the appropriate test of the validity and applicability of one of the Federal Rules of Civil Procedure:

> "The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court had held applicable a state rule in the face of an argument that the situation was governed by one of the

> Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." 380 U. S., at 470.

The Court cited *Ragan* as one of the examples of this proposition, 380 U. S., at 470, n. 12.[7] The Court explained that where the Federal Rule was clearly applicable, as in *Hanna*, the test was whether the Rule was within the scope of the Rules Enabling Act, 28 U. S. C. § 2072, and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I. 380 U. S., at 470–472.

III

The present case is indistinguishable from *Ragan*. The statutes in both cases require service of process to toll the statute of limitations, and in fact the predecessor to the Oklahoma statute in this case was derived from the predecessor to the Kansas statute in *Ragan*. See *Dr. Koch Vegetable Tea Co.* v. *Davis*, 48 Okla. 14, 22, 145 P. 337, 340 (1914). Here, as in *Ragan*, the complaint was filed in federal court under diversity jurisdiction within the 2-year statute of limitations, but service of process did not occur until after the 2-year period and the 60-day service period had run. In both cases the suit would concededly have been barred in the applicable state court, and in both instances the state service statute was held to be an integral part of the statute of limitations by the lower court more familiar than we with state law. Accordingly, as the Court of Appeals held below,

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[7] The Court in *Hanna* noted that "this Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State." 380 U. S., at 472.

the instant action is barred by the statute of limitations unless *Ragan* is no longer good law.

Petitioner argues that the analysis and holding of *Ragan* did not survive our decision in *Hanna*.[8] Petitioner's position is that Okla. Stat., Tit. 12, § 97 (1971), is in direct conflict with the Federal Rule. Under *Hanna*, petitioner contends, the appropriate question is whether Rule 3 is within the scope of the Rules Enabling Act and, if so, within the constitutional power of Congress. In petitioner's view, the Federal Rule is to be applied unless it violates one of those two restrictions. This argument ignores both the force of *stare decisis* and the specific limitations that we carefully placed on the *Hanna* analysis.

We note at the outset that the doctrine of *stare decisis* weighs heavily against petitioner in this case. Petitioner seeks to have us overrule our decision in *Ragan*. *Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law. In this case, the reasons petitioner asserts for overruling *Ragan* are the same factors which we concluded in *Hanna* did not undermine the validity of *Ragan*. A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence. Petitioner here has not met that burden.

This Court in *Hanna* distinguished *Ragan* rather than overruled it, and for good reason. Application of the *Hanna* analysis is premised on a "direct collision" between the Federal Rule and the state law. 380 U. S., at 472. In *Hanna* itself the "clash" between Rule 4 (d)(1) and the state in-hand service requirement was "unavoidable." 380 U. S., at 470. The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before

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[8] Mr. Justice Harlan in his concurring opinion in *Hanna* concluded that *Ragan* was no longer good law. 380 U. S., at 474–478. See also *Sylvestri v. Warner & Swasey Co.*, 398 F. 2d 598 (CA2 1968).

the Court. It is only if that question is answered affirmatively that the *Hanna* analysis applies.[9]

As has already been noted, we recognized in *Hanna* that the present case is an instance where "the scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, *Erie* command[s] the enforcement of state law." *Ibid.* Rule 3 simply states that "[a] civil action is commenced by filing a complaint with the court." There is no indication that the Rule was intended to toll a state statute of limitations,[10] much less that it purported to displace state

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[9] This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a "direct collision" with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna* v. *Plumer* applies.

[10] "Rule 3 simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." 4 C. Wright & A. Miller, Federal Practice and Procedure § 1057, p. 191 (1969) (footnote omitted).

The Note of the Advisory Committee on the Rules states:

"When a Federal or State statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4 (a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising." 28 U. S. C. App., pp. 394–395.

This Note establishes that the Advisory Committee predicted the problem which arose in *Ragan* and arises again in the instant case. It does not indicate, however, that Rule 3 was *intended* to serve as a tolling provision for statute of limitations purposes; it only suggests that the Advisory Committee thought the Rule *might* have that effect.

tolling rules for purposes of state statutes of limitations. In our view, in diversity actions [11] Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations. Cf. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1057, pp. 190–191 (1969); *id.*, § 1051, at 165–166.

In contrast to Rule 3, the Oklahoma statute is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations. See *C & C Tile Co.* v. *Independent School District No. 7 of Tulsa County*, 503 P. 2d 554, 559 (Okla. 1972). The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind; it also recognizes that after a certain period of time it is unfair to require the defendant to attempt to piece together his defense to an old claim. A requirement of actual service promotes both of those functions of the statute. See generally *ibid.*; *Seitz* v. *Jones*, 370 P. 2d 300, 302 (Okla. 1961). See also Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 730–731 (1974).[12] It is these policy aspects which make the service

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[11] The Court suggested in *Ragan* that in suits to enforce rights under a federal statute Rule 3 means that filing of the complaint tolls the applicable statute of limitations. 337 U. S., at 533, distinguishing *Bomar* v. *Keyes*, 162 F. 2d 136, 140–141 (CA2), cert. denied, 332 U. S. 825 (1947). See Ely, The Irrepressible Myth of Erie, 87 Harv. L. Rev. 693, 729 (1974). See also *Walko Corp.* v. *Burger Chef Systems, Inc.*, 180 U. S. App. D. C., at 308, n. 19, 554 F. 2d, at 1167, n. 19; 4 Wright & Miller, *supra*, § 1056, and authorities collected therein. We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law.

[12] The importance of actual service, with corresponding actual notice, to the statute of limitations scheme in Oklahoma is further demonstrated by the fact that under Okla. Stat., Tit. 12, § 97 (1971), the statute of limitations must be tolled as to each defendant through individual service, unless a codefendant who is served is "united in interest" with the unserved

requirement an "integral" part of the statute of limitations both in this case and in *Ragan*. As such, the service rule must be considered part and parcel of the statute of limitations.[13] Rule 3 does not replace such policy determinations found in state law. Rule 3 and Okla. Stat., Tit. 12, § 97 (1971), can exist side by side, therefore, each controlling its own intended sphere of coverage without conflict.

Since there is no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply.[14] Instead, the policies behind *Erie* and *Ragan* control the issue whether, in the absence of a federal rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in federal court under diversity

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defendant. That requirement, like the service requirement itself, does nothing to promote the general policy behind all statutes of limitations of keeping stale claims out of court. Instead, the service requirement furthers a different but related policy decision: that each defendant has a legitimate right not to be surprised by notice of a lawsuit after the period of liability has run. If the defendant is "united in interest" with a codefendant who has been served, then presumably the defendant will receive actual notice of the lawsuit through the codefendant and will not have his peace of mind disturbed when he receives official service of process. Similarly, the defendant will know that he must begin gathering his evidence while that task is still deemed by the State to be feasible.

[13] The substantive link of § 97 to the statute of limitations is made clear as well by another provision of Oklahoma law. Under Okla. Stat., Tit. 12, § 151 (1971), "[a] civil action is deemed commenced by filing in the office of the court clerk of the proper court a petition and by the clerk's issuance of summons thereon." This is the state-law corollary to Rule 3. However, § 97, not § 151, controls the commencement of the lawsuit for statute of limitations purposes. See *Tyler* v. *Taylor*, 578 P. 2d 1214 (Okla. App. 1977). Just as § 97 and § 151 can both apply in state court for their separate purposes, so too § 97 and Rule 3 may both apply in federal court in a diversity action.

[14] Since we hold that Rule 3 does not apply, it is unnecessary for us to address the second question posed by the *Hanna* analysis: whether Rule 3, if it applied, would be outside the scope of the Rules Enabling Act or beyond the power of Congress under the Constitution.

jurisdiction. The reasons for the application of such a state service requirement in a diversity action in the absence of a conflicting federal rule are well explained in *Erie* and *Ragan*, see *supra*, at 744–746, and need not be repeated here. It is sufficient to note that although in this case failure to apply the state service law might not create any problem of forum shopping,[15] the result would be an "inequitable administration" of the law. *Hanna* v. *Plumer*, 380 U. S., at 468. There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants. The policies underlying diversity jurisdiction do not support such a distinction between state and federal plaintiffs, and *Erie* and its progeny do not permit it.

The judgment of the Court of Appeals is

Affirmed.

[15] There is no indication that when petitioner filed his suit in federal court he had any reason to believe that he would be unable to comply with the service requirements of Oklahoma law or that he chose to sue in federal court in an attempt to avoid those service requirements.

HANRAHAN ET AL. *v.* HAMPTON ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 79-912. Decided June 2, 1980*

The Civil Rights Attorney's Fees Awards Act of 1976 (Act) permits the award of a reasonable attorney's fee to the "prevailing party" as part of the taxable costs in a suit brought under any of several specified civil rights statutes. Respondents brought suit under certain of those statutes, alleging that their constitutional rights had been violated by petitioners, and seeking damages. The District Court directed verdicts for petitioners, but the Court of Appeals reversed and remanded for a new trial, and also awarded to respondents their costs on appeal, including attorney's fees which it believed to be authorized by the Act.

Held: Respondents were not "prevailing" parties in the sense intended by the Act. While Congress contemplated the award of fees *pendente lite* in some cases, it intended to permit such an interlocutory award only when a party has prevailed on the merits of at least some of his claims, either in the trial court or on appeal. Respondents have not prevailed on the merits of any of their claims, since the Court of Appeals held only that they were entitled to a trial of their cause. Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions that affected only the extent of discovery, since such determinations might affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under the Act.

Certiorari granted in part; 600 F. 2d 600, reversed in part.

PER CURIAM.

In the Civil Rights Attorney's Fees Awards Act of 1976, Congress amended 42 U. S. C. § 1988 to permit the award of a reasonable attorney's fee to the "prevailing party" as part of the taxable costs in a suit brought under any of several specified civil rights statutes. The respondents brought suit

*Together with No. 79-914, *Johnson et al.* v. *Hampton et al.*, also on certiorari to the same court.

under three of those statutes in the United States District Court for the Northern District of Illinois, alleging that their constitutional rights had been violated by the petitioners, and seeking money damages from them.[1] The District Court directed verdicts for the petitioners, but the Court of Appeals reversed and remanded the case to the District Court for a new trial, 600 F. 2d 600. The Court of Appeals also awarded to the respondents their costs on appeal, including attorney's fees which it believed to be authorized by § 1988. *Id.*, at 643–644.[2]

The final sentence of § 1988, as amended, provides as follows:

"In any action or proceeding to enforce a provision of

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[1] The controversy arose from the execution in 1969 of a judicial warrant to search for and seize illegal weapons within an apartment in Chicago occupied by nine members of the Black Panther Party. In the course of the search two of the apartment's occupants were killed by gunfire, and four others were wounded. The police seized various weapons and arrested the seven surviving occupants of the apartment. The survivors were indicted by a state grand jury on charges of attempted murder and aggravated battery, but the indictments ultimately were dismissed. Those seven persons and the legal representatives of the two persons killed are the respondents in these cases. Named as defendants in the respondents' suits were Cook County, the city of Chicago, and various state and local officials allegedly involved in the search or its aftermath. Those officials are the petitioners in No. 79–912. After proceedings in the District Court and the Court of Appeals resulted in the dismissal of the complaint against the city and the county, see *Hampton* v. *Chicago*, 339 F. Supp. 695 (ND Ill. 1972), aff'd in part and rev'd in part, 484 F. 2d 602 (CA7 1973), the respondents filed an amended complaint naming as additional defendants the three Federal Bureau of Investigation agents and an informant who are the petitioners in No. 79–914.

The respondents based their claims on 42 U. S. C. §§ 1983, 1985 (3) (1976 ed., Supp. II), and 1986, and on provisions of the Constitution. They also alleged various causes of action under state law.

[2] In an unpublished supplemental opinion issued on December 12, 1979 (as amended December 21, 1979), fixing the amount of the fee award, the Court of Appeals reiterated its conclusion that the respondents were "prevailing parties" within the meaning of 42 U. S. C. § 1988.

> sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U. S. C. § 1988.

The statute by its terms thus permits the award of attorney's fees only to a "prevailing party." Accordingly, in the present cases, the Court of Appeals was authorized to award to the respondents the attorney's fees attributable to their appeal only if, by reason of obtaining a partial reversal of the trial court's judgment, they "prevailed" within the meaning of § 1988. The Court of Appeals believed that they had prevailed with respect to the appeal in this case,[3] resting its conclusion upon the following appellate rulings favorable to the respondents: (1) the reversal of the District Court's judgment directing verdicts against them, save with respect to certain of the defendants; (2) the reversal of the District Court's denial of their motion to discover the identity of an informant; and (3) the direction to the District Court on remand to consider allowing further discovery, and to conduct a hearing on the respondents' contention that the conduct of some of the petitioners in response to the trial court's discovery orders warranted the imposition of sanctions under Federal Rule of Civil Procedure 37 (b)(2). While the respondents did prevail on these matters in the sense that the Court of Appeals overturned several rulings against them by the District Court, they were not, we have concluded, "prevailing" parties in the sense intended by 42 U. S. C. § 1988, as amended.

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 indicates that a person may in some circumstances be a "prevailing party" without having obtained a

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[3] The Court of Appeals recognized that the respondents had not "prevailed" in the District Court, and for that reason limited the award of counsel fees to those incurred by the respondents in the course of the appeal. 600 F. 2d 600, 643–644.

favorable "final judgment following a full trial on the merits," H. R. Rep. No. 94–1558, p. 7 (1976). See also S. Rep. No. 94–1011, p. 5 (1976). Thus, for example, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," *ibid.* See also H. R. Rep. No. 94–1558, *supra*, at 7, and cases cited; *Dawson* v. *Pastrick*, 600 F. 2d 70, 78 (CA7 1979); *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279–281 (CA1 1978).

It is evident also that Congress contemplated the award of fees *pendente lite* in some cases. S. Rep. No. 94–1011, *supra*, at 5; H. R. Rep. No. 94–1558, *supra*, at 7–8. But it seems clearly to have been the intent of Congress to permit such an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases—*Bradley* v. *Richmond School Board*, 416 U. S. 696 (1974), and *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970). S. Rep. No. 94–1011, *supra*, at 5; H. R. Rep. No. 94–1558, *supra*, at 8. In each of those cases the party to whom fees were awarded had established the liability of the opposing party, although final remedial orders had not been entered. The House Committee Report, moreover, approved the standard suggested by this Court in *Bradley*, that " 'the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees . . . ,' " H. R. Rep. No. 94–1558, *supra*, at 8, quoting *Bradley* v. *Richmond School Board*, *supra*, at 723, n. 28. Similarly, the Senate Committee Report explained that the award of counsel fees *pendente lite* would be "especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues." S. Rep. No. 94–1011, *supra*, at 5 (emphasis added). It seems apparent from these pas-

sages that Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims. For only in that event has there been a determination of the "substantial rights of the parties," which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney.[4]

The respondents have of course not prevailed on the merits of any of their claims. The Court of Appeals held only that the respondents were entitled to a trial of their cause.[5] As a practical matter they are in a position no different from that

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[4] The provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a–3 (b) and 2000e–5 (k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U. S. C. § 1973*l* (e). S. Rep. No. 94–1011, p. 2 (1976); H. R. Rep. No. 94–1558, p. 5 (1976). Those provisions have been construed by the Courts of Appeals to permit the award of counsel fees only to a party who has prevailed on the merits of a claim. See *Bly* v. *McLeod*, 605 F. 2d 134, 137 (CA4 1979) (Voting Rights Act); *Chinese for Affirmative Action* v. *Leguennec*, 580 F. 2d 1006, 1009 (CA9 1978) (same); *Grubbs* v. *Butz*, 179 U. S. App. D. C. 18, 20–21, 548 F. 2d 973, 975–976 (1976) (Title VII); *Sperling* v. *United States*, 515 F. 2d 465, 485 (CA3 1975) (same). See also *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 418 (1978) ("[W]hen a district court awards counsel fees [under the Civil Rights Act of 1964] to a prevailing plaintiff, it is awarding them against a violator of federal law"). But cf. *Van Hoomissen* v. *Xerox Corp.*, 503 F. 2d 1131, 1133 (CA9 1974).

In the cases cited by the Court of Appeals to justify the award of counsel fees in these cases, those to whom fees were awarded had prevailed on the merits of at least some of their claims. See *Davis* v. *Murphy*, 587 F. 2d 362, 363–364 (CA7 1978); *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 279–281 (CA1 1978); *Wharton* v. *Knefel*, 562 F. 2d 550, 556 (CA8 1977).

[5] The Court of Appeals stated that, in reversing the directed verdicts, it was "not passing on the ultimate validity of [the respondents'] claims," 600 F. 2d, at 621, n. 20. Indeed, Chief Judge Fairchild emphasized in his concurring opinion that the court's use of the phrase " 'prima facie' case" in referring to the evidence adduced by the respondents should not be taken to mean that at "any stage of this case . . . the evidence compelled a verdict for [the respondents] unless rebutted." *Id.*, at 648.

they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. The jury may or may not decide some or all of the issues in favor of the respondents. If the jury should not do so on remand in these cases, it could not seriously be contended that the respondents had prevailed. See *Swietlowich* v. *Bucks County*, 620 F. 2d 33, 34 (CA3 1980). Nor may they fairly be said to have "prevailed" by reason of the Court of Appeals' other interlocutory dispositions, which affected only the extent of discovery. As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under § 1988. See *Bly* v. *McLeod*, 605 F. 2d 134, 137 (CA4 1979).

The motion of Fraternal Order of Police of the State of Illinois in case No. 79–912 for leave to file a brief, as *amicus curiae*, is granted.

The respondents' motions for leave to proceed *in forma pauperis* are granted, the petitions for certiorari are granted, limited to the question of the propriety of the award of attorney's fees by the Court of Appeals, and the judgment is reversed insofar as it awarded attorney's fees to the respondents. In all other respects, the petitions for certiorari are denied.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in part and dissenting in part.

I join the Court's opinion insofar as it reverses the award of attorney's fees entered by the Court of Appeals for the Seventh Circuit. As I would grant the petition filed by the

federal defendants in its entirety, I dissent from the denial of certiorari in No. 79–914.[1]

I

This civil litigation arose in the aftermath of a 1969 police raid on a Chicago apartment occupied by nine members of the Black Panther Party, two of whom were killed. The surviving occupants of the apartment and the legal representatives of the deceased Black Panthers filed four actions for damages, now consolidated, against 28 state and federal law enforcement officials. The complaints allege numerous violations of constitutional rights. In particular, the plaintiffs claim that three agents assigned to the Federal Bureau of Investigation's Chicago office and an informant working with them (the federal defendants) conspired with state officers to carry out the operation, to conceal its allegedly sinister nature, and to harass the plaintiffs with unfounded prosecutions.

The jury trial lasted 18 months, generating a 37,000-page transcript and masses of documentary evidence. At the close of the plaintiffs' case, some 16 months after trial began, the District Court granted directed verdicts in favor of the federal and most of the state defendants. Trial continued as to the police officers who actually participated in the apartment incident. Ultimately, the jury deadlocked and the District Court entered a final judgment directing verdicts in favor of all of the defendants. A divided panel of the Court of Appeals vacated the judgment and ordered a new trial as to all but four of the defendants.

I have not reviewed the entire record of what is said to have been "the longest case tried to a jury in the history of the United States judiciary." Memorandum of District Court, App. to Pet. for Cert. in No. 79–914, p. 175a. I have, how-

[1] I confine this dissent to the federal defendants, although it is not clear that the Court of Appeals properly reversed the directed verdicts as to many of the other defendants. See 600 F. 2d 600, 649 (1979) (Pell, J., dissenting in part).

ever, read with care the three separate opinions filed in the Court of Appeals as well as the District Court's extensive memorandum. Each judge agreed that the case against the federal defendants turns upon the sufficiency of the evidence regarding the alleged conspiracy.

At the close of the plaintiffs' case in chief, the District Court "reviewed all of the evidence . . . with all reasonable inferences that could be drawn therefrom, in the light most favorable to the plaintiffs." *Id.*, at 186a. The court found the record "devoid of proof of . . . participation [by the federal defendants] in a conspiratorial plan among themselves or with the state defendants. Thus no liability on their part existed and their motions for directed verdicts were granted." *Id.*, at 193a–194a. More specifically, the court explained:

> "Each of the Federal defendants was called by plaintiffs as adverse witnesses. Each testified extensively and denied knowledge or [*sic*], or participation in, a plan, or an agreement, or a conspiracy between themselves, or between them or any of them, and any and all of the State defendants to violate plaintiffs' constitutional and statutory rights through conduct of the search of the apartment, or prior thereto, or after the occurrence, or otherwise. Their denials were uncontradicted and unimpeached by any testimony whatsoever." *Id.*, at 189a–190a.

Despite the explicit findings of the judge who presided over this 18-month trial, a majority of the Court of Appeals drew its own inferences and concluded that the evidence was sufficient to "warrant a jury determination of whether a conspiracy existed." 600 F. 2d 600, 621 (1979). The majority's lengthy opinion indicates that the court relied primarily, if not entirely, upon extensive testimony describing an FBI counterintelligence program directed against a number of organizations including the Black Panther Party.

There is no question that the FBI viewed that organization, which openly advocated armed resistance to authority and

had a documented record of violence,[2] as a serious threat to public safety and to the lives of law enforcement officers. But the issue at trial was not whether the FBI had a program designed to discredit the Black Panthers, or even whether the program had produced excesses. The only issue was whether these federal defendants conspired with state officers to conduct an unlawful search in which excessive force would be used or, subsequently, to harass the plaintiffs with malicious prosecutions. See *id.*, at 648–649 (Fairchild, C. J., concurring).

No one contends that any of the federal defendants took part in the raid itself. They did supply information to state officers about illegal firearms stored in the apartment. But each federal defendant testified that he did not know of and did not participate in any planning or joint activity regarding the operation at any time. This uncontradicted testimony was fully corroborated by the state defendants. In these circumstances, inferences drawn from a program not shown to have been related to the events in question are of dubious value. Judge Pell, dissenting in part in the Court of Appeals, viewed the matter as follows:

> "Going next to the . . . remaining state defendants and the federal defendants, I cannot agree that there was a basis for reasonable inferences that there was any kind of an agreement among them, express or implicit, to

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[2] Summarizing evidence of record, Judge Pell's dissent described the party as an "extremist, paramilitary, uniformed organization. . . . It was a violent, revolutionary organization, which by party edict required its members to own and know how to use weapons and to have access to more than one weapon." *Id.*, at 654.

Judge Pell also noted that "Black Panther publications called for killing policemen," that the party "published a 'Destruction Kit' which described how to make and use incendiary bombs and other similar devices," that children attending its highly praised breakfast program were instructed to "Kill the Pigs," and that Black Panthers had "boasted" that one of their members had killed two Chicago police officers less than a month before the events at issue in this case. *Id.*, at 654–655.

cause a raid to be made with the object of killing or wounding various Black Panther Party members. It is true that at the time in question, the federal authorities thought it would be in the public good to neutralize the Black Panther Party so that it could not carry out its avowed purpose, among others, of killing policemen. Indeed, the idea perhaps could have been entertained by some, if not all, of those defendants who were engaged in law enforcement work that the community would be a safer place for law-abiding citizens to live and work in if Fred Hampton and his cohorts were not on the scene. This human feeling is far removed from a basis for an inference that they deliberately set a course to accomplish that by violence.

"In our jurisprudence a person cannot be convicted of a traffic offense unless proven guilty beyond a reasonable doubt. Even though the present case is of the civil variety, I cannot believe that the law should permit a determination that any person has deliberately planned a homicide on nothing more than speculative conjecture or mere suspicion. The hard basic reasonable inference-creating facts just did not exist in this case." *Id.*, at 660–661.

In the absence of positive evidence or "reasonable inference-creating facts," there was no reason to include the federal defendants in the remand for a second trial.

II

This Court ordinarily leaves questions as to the sufficiency of evidence in a particular case to the courts below. But this is not ordinary litigation. Although it may appear on the surface to be an unexceptional civil rights suit for damages, the extraordinary magnitude of the litigation and the nature and scope of the evidence demonstrate that this lawsuit differs

from the civil damages actions to which our courts are accustomed.

Judge Pell observed that "this case has important overtones of unbridled denigrating attacks on governmental officials." *Id.*, at 666. The allegations of unconstitutional conduct by the state defendants are serious indeed, and I express no view on the merits of these claims. But the plaintiffs have a larger target: the Federal Bureau of Investigation. It is apparent that a basic trial strategy was to attack the FBI broadly. If there were sufficient relevant evidence to support the plaintiffs' claims, the law would require that they go to the jury regardless of underlying motive. Yet the presence of this collateral objective, related only tangentially if at all to the recovery of damages, imposed a special duty on the courts to bear in mind the admonition of *Butz* v. *Economou*, 438 U. S. 478, 508 (1978), that "federal officials [not be] harassed by frivolous lawsuits."

Butz rejected a claim that all highly placed federal officials should be absolutely immune from liability for civil rights violations. But federal officials, like state officials sued under 42 U. S. C. § 1983, have qualified immunity from suit. They therefore are liable only when they "discharge their duties in a way that is known to them to violate . . . a clearly established constitutional rule." 438 U. S., at 507. In *Butz*, we emphasized that absolute immunity is unnecessary to protect the public interest in "encouraging the vigorous exercise of official authority," *id.*, at 506, because qualified immunity shields officials from liability for good-faith mistakes. We predicted that such immunity would prove "workable," because "firm application of the Federal Rules of Civil Procedure" would permit "[i]nsubstantial lawsuits [to] be quickly terminated." In particular, "damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment. . . ." *Id.*, at 507–508. The District Court heeded this admonition.

In reversing that court, the Court of Appeals misappreciated the premises on which this Court rested its ruling in *Butz*. In *Butz*, we endeavored to accommodate two important societal objectives: to compensate persons injured by civil rights violations, and to do so without discouraging vigorous enforcement of the laws. The first objective impelled the Court to reject absolute in favor of qualified immunity for most officials. We recognized, however, that our decision would invite litigation in which constitutional claims easily are asserted. We therefore cautioned the judiciary to exercise their authority under the rules of procedure in order to protect official defendants from groundless claims. *Id.*, at 507.

Our concern in *Butz* was that extravagant charges might force officials to trial on claims that lacked a substantial basis in fact. In this case, there can be little speculation as to what evidence may be marshaled in support of the complaint. After 16 months of trial devoted exclusively to the plaintiffs' evidence, the trial court found the record wholly "devoid of proof of . . . participation" by the federal defendants in the conspiracy alleged. App. to Pet. for Cert. in No. 79–914, p. 193a. These defendants continue to assert that their conduct was a routine and good-faith effort at cooperative law enforcement. Neither the parties nor the courts below have identified concrete evidence to the contrary. If a new trial may be ordered in this case, similar allegations could survive properly supported motions for summary judgment on the basis of speculative inferences from unrelated evidence. The prospect of defending such lawsuits can hardly fail to "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949).

III

The Court of Appeals' remand for a second trial as to the federal defendants in this case vitiates the protection we

sought to insure in *Butz*. The effect on legitimate law enforcement efforts could be serious. At the least, these officers' experience is likely to discourage other federal officials from cooperating with state law enforcement agencies over which they have no control. I would grant the petition for certiorari.

MR. JUSTICE MARSHALL, dissenting.

It is not clear to me that the award of attorney's fees in this case was in error because "respondents have of course not prevailed on the merits of any of their claims." *Ante*, at 758. The Court concedes that Congress in passing the Civil Rights Attorney's Fees Awards Act of 1976 contemplated the award of attorney's fees *pendente lite* in certain instances, and that a litigant may be a "prevailing party" for purposes of the Act without obtaining final judgment on the merits following a full trial. It is sufficient if there has been a determination of "'substantial rights of the parties,'" *ante*, at 757, quoting H. R. Rep. No. 94–1558, p. 8 (1976).

In the instant case, respondents have been successful in obtaining reversal on appeal of a directed verdict entered against them. While this "only" means that respondents are entitled to a trial of their cause, *ante*, at 758, that is a major accomplishment which determines "substantial rights of the parties." Had petitioners been successful in defending their directed verdict on appeal, there is no doubt that they would be considered to have prevailed on the merits; the lawsuit would have been finished. Obtaining an appellate order requiring that a new trial be held after an action to enforce civil rights has been prematurely terminated similarly is an achievement reflecting on the merits of the case. The decision of the Court of Appeals, establishing that respondents produced sufficient evidence to warrant sending their case to the jury, breathes new life into an otherwise dead lawsuit. Without full briefing and oral argument, I am unable to

say that this does not fall within the category of legal victories which determine "substantial rights of the parties" for purposes of the Act.

In my view, the attorney's fees issue is sufficiently difficult to warrant the plenary attention of this Court rather than summary reversal. Accordingly, I dissent.

Reporter's Note

The next page is purposely numbered 901. The numbers between 767 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM APRIL 21 THROUGH JUNE 5, 1980

APRIL 21, 1980

Appeals Dismissed

No. 78–5928. WALLER *v.* UNITED STATES. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 389 A. 2d 801.

No. 79–1339. CHILDS *v.* CHILDS. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 69 App. Div. 2d 406, 419 N. Y. S. 2d 533.

No. 79–1145. BUDGET MARKETING, INC., ET AL. *v.* KENTUCKY. Appeal from Sup. Ct. Ky. dismissed for want of substantial federal question. MR. JUSTICE STEWART would note probable jurisdiction and set case for oral argument. Reported below: 587 S. W. 2d 245.

No. 79–1341. BOWMAN *v.* MAINE STATE EMPLOYEES APPEALS BOARD ET AL. Appeal from Sup. Jud. Ct. Me. dismissed for want of substantial federal question. Reported below: 408 A. 2d 688.

No. 79–5946. PARKINS ET AL. *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 77 Ill. 2d 253, 396 N. E. 2d 22.

No. 79–6094. CRUZ *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 48 N. Y. 2d 419, 399 N. E. 2d 513.

No. 79–6160. JACKSON *v.* WISCONSIN. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 92 Wis. 2d 905, 287 N. W. 2d 853.

No. 79–6174. HIGGINS *v.* MISSOURI. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 592 S. W. 2d 151.

No. 79–6050. CROSS *v.* CHURCH ET AL. Appeal from Small Claims Court, San Mateo County, Cal., dismissed for want of jurisdiction.

No. 79–6152. HAYES *v.* VALLEY BANK OF NEVADA; and HAYES *v.* GLADSTONE ET AL. Appeal from Sup. Ct. Nev. dismissed for want of properly presented federal question.

Vacated and Remanded on Appeal

No. 78–5422. GONZALEZ *v.* NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 63 App. Div. 2d 686, 404 N. Y. S. 2d 933.

Certiorari Granted—Vacated and Remanded

No. 77–6769. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980).

No. 78–5403. BUSCH *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 355 So. 2d 488.

No. 78–5471. PYNES *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Whalen* v. *United States*, 445 U. S. 684 (1980). Reported below: 385 A. 2d 772.

No. 78–6276. VIDAL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 61 App. Div. 2d 825, 402 N. Y. S. 2d 61.

No. 78–6839. GORDON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 67 App. Div. 2d 931, 413 N. Y. S. 2d 29.

No. 79–326. UNITED STATES *v.* DUNCAN ET AL. Ct. Cl. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mitchell*, 445 U. S. 535 (1980). Reported below: 220 Ct. Cl. 1, 597 F. 2d 1337.

No. 79–620. SALA *v.* COUNTY OF SUFFOLK. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Owen* v. *City of Independence*, 445 U. S. 622 (1980). Reported below: 604 F. 2d 207.

No. 79–711. ALABAMA *v.* DAVIS. C. A. 5th Cir. Certiorari granted, judgment of the Court of Appeals vacated, and that court is directed to remand the case to the United States District Court for the Northern District of Alabama with instructions to vacate the order denying the petition for

a writ of habeas corpus. See *United States* v. *Munsingwear*, 340 U. S. 36 (1950). Reported below: 596 F. 2d 1214.

MR. JUSTICE STEVENS, dissenting.

In *United States* v. *Munsingwear*, 340 U. S. 36, 39, the Court stated that

> "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

But that need not be done in this case, first, because respondent Davis' petition for a writ of habeas corpus has already been dismissed by the District Court on motion by Davis after the State's petition for a writ of certiorari had been filed. See Supplement to Pet. for Cert. 6. And second, it should be noted that the judgment of the Court of Appeals did not order that Davis be released from custody, but merely held that his attorneys had failed to discharge their duty to their client, and therefore reversed and remanded the case for an evidentiary hearing to determine whether that failure had prejudiced him. 596 F. 2d 1214, 1223 (CA5 1979). If such a hearing should one day be held in accordance with the opinion of the Court of Appeals, and should Davis ultimately succeed in getting his conviction vacated, there will still be an opportunity for this Court to review any decision on the merits. In the meantime, it is difficult to see what harm would flow to the State if we were simply to let the judgment of the Court of Appeals stand. There is no realistic possibility that the judgment could "spaw[n] any legal consequences." *United States* v. *Munsingwear*, *supra*, at 41. Thus, there is no particular justification for this Court's intervention.

Accordingly, I would simply deny the petition for a writ of certiorari.

No. 79–1178. FAYMOR DEVELOPMENT CO., INC. *v.* KING ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stryker's Bay Neighborhood Council* v. *Karlen*, 444 U. S. 223 (1980). MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS dissent. Reported below: 614 F. 2d 1288.

No. 79–1312. PENNSYLVANIA *v.* HENDERSON. Super. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Fare* v. *Michael C.*, 442 U. S. 707 (1979). MR. JUSTICE BRENNAN and MR. JUSTICE STEVENS dissent. Reported below: 266 Pa. Super. 519, 405 A. 2d 940.

No 79–1329. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR *v.* WALTER TANTZEN, INC., ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *P. C. Pfeiffer Co.* v. *Ford*, 444 U. S. 69 (1979). Reported below: 601 F. 2d 670.

No. 79–5438. GAYLE, AKA WAITERS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 70 App. Div. 2d 788, 416 N. Y. S. 2d 158.

No. 79–5853. DUNAGAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York*, 445 U. S. 573 (1980). Reported below: 71 Ill. App. 3d 972, 389 N. E. 2d 1261.

Miscellaneous Orders

No. A–833. HOLLIDAY ET AL. *v.* HAUPTMAN, TRUSTEE. C. A. 2d Cir. Application for stay, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. D–152. IN RE DISBARMENT OF WATERS. Disbarment entered. [For earlier order herein, see 439 U. S. 1042.]

No. D–157. IN RE DISBARMENT OF MITCHELL. Disbarment entered. [For earlier order herein, see 440 U. S. 933.]

No. D–176. IN RE DISBARMENT OF PRAVDA. Disbarment entered. [For earlier order herein, see 444 U. S. 895.]

No. D–179. IN RE DISBARMENT OF KYLE. Disbarment entered. [For earlier order herein, see 444 U. S. 912.]

No. D–185. IN RE DISBARMENT OF MITCHELL. It is ordered that Freeman D. Mitchell, of Atlanta, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of the Special Master, Walter P. Armstrong, Jr., for allowance of additional compensation and reimbursement of expenses, as set forth in the motion, granted, and it is ordered that such costs be borne equally by the United States and Louisiana. The Court defers action at this time on the Special Master's suggestion for discharge with respect to the reference of October 20, 1975 [423 U. S. 909]. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, 445 U. S. 923.]

No. 78–1881. CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* CAMPA ET AL., 444 U. S. 1028. Motion of appellees for attorney's fees denied.

No. 79–602. AGINS ET UX. *v.* CITY OF TIBURON. Sup. Ct. Cal. [Probable jurisdiction noted, 444 U. S. 1011.] Motion of New Jersey for leave to file a brief as *amicus curiae* denied.

No. 79–952. THOMAS *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. [Certiorari granted, 444 U. S. 1070.] Motions of Jewish Peace Fellowship et al., American Jewish Congress, American Civil Liberties Union, and Americans United for Separation of Church and State Fund, Inc., for leave to file briefs as *amici curiae* granted.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. D. C. E. D. N. Y. [Probable jurisdiction noted, 444 U. S. 1069.] Motion for reconsideration of motion for appointment of Alan Ernest as counsel for children unborn and born alive denied.

Probable Jurisdiction Noted

No. 79–1260. CHANDLER ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. Probable jurisdiction noted. Reported below: 376 So. 2d 1157.

Certiorari Granted

No. 79–814. DELTA AIR LINES, INC. *v.* AUGUST. C. A. 7th Cir. Certiorari granted. Reported below: 600 F. 2d 699.

Certiorari Denied. (See also Nos. 78–5928 and 79–1339, *supra.*)

No. 78–6098. GAULTNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 1137.

No. 78–6834. JONES *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 274 N. W. 2d 273.

No. 79–261. BARNES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 604 F. 2d 121.

No. 79–851. CLAUSER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 145, 391 N. E. 2d 793.

No. 79–1123. NEVILLE *v.* CAVANAUGH, STATE'S ATTORNEY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 673.

No. 79–1130. THEVIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–1139. CITY OF NEW YORK ET AL. *v.* DEPIETRO. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 995.

No. 79–1148. SPARKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1183. SIMA PRODUCTS CORP. ET AL. *v.* MCLUCAS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. 7th Cir. Certiorari denied. Reported below: 612 F. 2d 309.

No. 79–1188. CLEMENTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 76.

No. 79–1202. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1008.

No. 79–1204. NOLICHUCKEY SAND CO., INC. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 693.

No. 79–1205. WIREMAN *v.* DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied.

No. 79–1220. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–1229. KLAUBER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 512.

No. 79–1230. COATS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 37.

No. 79–1277. TREPEL PETROLEUM CORP. *v.* CLEVEROCK ENERGY CORP. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 1358.

No. 79–1327. NORMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 588 S. W. 2d 340.

No. 79–1328. BOROUGH OF DOYLESTOWN *v.* BRADSHAW ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 135.

No. 79–1330. CLIFFORD, COMMISSIONER, DEPARTMENT OF HEALTH OF NIAGARA COUNTY, NEW YORK *v.* SUSAN B. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–1335. ABRAMS, ATTORNEY GENERAL OF NEW YORK *v.* SALLA ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 514, 399 N. E. 2d 909.

No. 79–1337. SINDONA *v.* TISCH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–1338. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–1347. SPENCER *v.* GREYHOUND LINES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–1353. ROBERT BOSCH GMBH *v.* PAPENDICK. Sup. Ct. Del. Certiorari denied. Reported below: 410 A. 2d 148.

No. 79–1358. SLONE *v.* BLOCKSOM & Co. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1046.

No. 79–1437. GUST ET AL. *v.* COMMISSIONER OF TAXATION AND FINANCE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287 and 1291.

No. 79–1480. MCGUIRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1028.

No. 79–1484. SAITTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 612 F. 2d 205.

No. 79–1488. HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1145.

No. 79–1500. TEICHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–1503. RODRIQUEZ-MARTINEZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 92.

No. 79–5477. JORDAN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–5808. MITCHELL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 858.

No. 79–5876. SEARLES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–5957. ALMON *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 863, 261 S. E. 2d 772.

No. 79–5988. SPARROW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5991. ROYSDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79–6043. KIBERT *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 611 F. 2d 520.

No. 79–6045. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 194.

No. 79–6057. GRAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 611 F. 2d 194.

No. 79–6082. THOMPSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 92, 612 F. 2d 587.

No. 79–6146. DOUGLAS, AKA JOHNSON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 810.

No. 79–6147. SMITH *v.* COLLINS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 104.

No. 79–6155. AUSTIN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 124 Ariz. 231, 603 P. 2d 502.

No. 79–6158. BOYKIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 298 N. C. 687, 259 S. E. 2d 883.

No. 79–6159. MARTIN *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 92.

No. 79–6161. HOHENSEE *v.* SOUTHARD ET AL. Sup. Ct. Pa. Certiorari denied.

No. 79–6164. DUNCAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 79–6166. THOMAS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 406 Mich. 971.

No. 79–6178. BOALBEY *v.* KINDRED. Sup. Ct. Ill. Certiorari denied. Reported below: See 73 Ill. App. 3d 37, 391 N. E. 2d 236.

No. 79–6183. COOPER *v.* CITY OF COMMERCE CITY, COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 198 Colo. 553, 609 P. 2d 106.

No. 79–6214. GIST ET AL. *v.* JAMES H. THOMPSON & SON FUNERAL HOME. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79–6225. TARKOWSKI *v.* CHADWELL, KAYSER, RUGGLES, McGEE & HASTINGS ET AL. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 79–6296. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 535.

No. 79–6299. KAIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79–6302. MALLETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 778.

No. 79–6308. HACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 1203.

No. 79–6312. COUCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 616 F. 2d 954.

No. 78–1697. PENNSYLVANIA *v.* WILLIAMS. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 483 Pa. 293, 396 A. 2d 1177.

No. 79–1096. PEARSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 587 S. W. 2d 393.

No. 79–593. BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* HOLLEY ET AL.; and

No. 79–594. RUSSO, COMMISSIONER OF MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES *v.* HOLLEY ET AL. C. A. 2d Cir. Motions of respondent Holley for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 638.

No. 79–1331. DEPARTMENT OF SAFETY OF NEW HAMPSHIRE ET AL. *v.* CARLSON. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 609 F. 2d 1024.

No. 79–1332. GOODMAN ET AL. *v.* McDONNELL DOUGLAS CORP. C. A. 8th Cir. Motion of petitioners for leave to proceed as veterans granted. Certiorari denied. Reported below: 606 F. 2d 800.

No. 79–6148. RUTLEDGE *v.* FLORIDA. Sup. Ct. Fla.;

No. 79–6175. HOLMES *v.* FLORIDA. Sup. Ct. Fla.; and

No. 79–6241. DOBBS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–6148, 374 So. 2d 975; No. 79–6175, 374 So. 2d 944; No. 79–6241, 245 Ga. 208, 264 S. E. 2d 18.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78–1453. UNITED STATES ET AL. *v.* EUGE, 444 U. S. 707;

No. 79–5663. WILLIAMS *v.* VIRGINIA, 445 U. S. 917; and

No. 79–6075. CONRAD *v.* GREENE, U. S. DISTRICT JUDGE, ET AL., 445 U. S. 921. Petitions for rehearing denied.

APRIL 25, 1980

Miscellaneous Order

No. A–904. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Application for stay of judgment of the Superior Court of the State of California for the County of Los Angeles, entered December 31, 1979, presented to MR. CHIEF JUSTICE BURGER, and by him referred to the Court, denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

APRIL 28, 1980

Appeal Dismissed

No. 79–6015. ROBERTSON *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question. Reported below: 586 S. W. 2d 877.

Certiorari Granted—Vacated and Remanded

No. 79–1044. BUSH *v.* LUCAS. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Carlson* v. *Green, ante,* p. 14. Reported below: 598 F. 2d 958.

Miscellaneous Orders

No. A–844. WALTON *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. A–863. GREEN *v.* BARTHOLOMEW ET AL. C. A. 2d Cir. Application for stay of mandate, addressed to MR. JUSTICE STEWART and referred to the Court, denied.

No. A–892. MARCELLO *v.* UNITED STATES. Application for bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. D–186. In re Disbarment of Cooper. It is ordered that David B. Cooper, of Bellaire, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–187. In re Disbarment of Wolk. It is ordered that Leon S. Wolk, of Woodcliff Lake, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–188. In re Disbarment of Kesler. It is ordered that John A. Kesler, of Terre Haute, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–189. In re Disbarment of Mann. It is ordered that Robert G. Mann, of Indianapolis, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–190. In re Disbarment of Fusciello. It is ordered that John P. Fusciello, of Colts Neck, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 78–1577. Sears, Roebuck & Co. *v.* County of Los Angeles et al. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 444 U. S. 823.] Case restored to calendar for reargument. Mr. Justice Stewart took no part in the consideration or decision of this order.

No. 79–45. LEWIS, COMPTROLLER OF FLORIDA *v.* BT INVESTMENT MANAGERS, INC., ET AL. D. C. N. D. Fla. [Probable jurisdiction noted, 444 U. S. 822.] Motion of appellees for leave to file a supplemental brief after argument granted.

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. [Certiorari granted, 444 U. S. 1069.] Motion of the Solicitor General to dispense with printing appendix granted.

No. 79–870. UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ. D. C. S. D. Ind. [Probable jurisdiction noted, 444 U. S. 1069.] Motion of the Solicitor General to dispense with printing appendix granted.

No. A–887 (79–1637). J. P. STEVENS & CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Application for stay of judgment of the United States Court of Appeals for the Fourth Circuit, presented to MR. CHIEF JUSTICE BURGER, and by him referred to the Court, denied.

No. 79–5515. BROWN *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Motion to schedule the petition for writ of certiorari for consideration denied.

No. 79–5780. WEAVER *v.* GRAHAM, GOVERNOR OF FLORIDA. Sup. Ct. Fla. [Certiorari granted, 445 U. S. 927.] Motion of petitioner for appointment of counsel granted, and it is ordered that Thomas C. MacDonald, Jr., Esquire, of Tampa, Fla., be appointed to serve as counsel for petitioner in this case.

No. 79–1397. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP. Motion for leave to file a petition for writ of certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 79–1388. KIRCHBERG *v.* FEENSTRA ET AL. Appeal from C. A. 5th Cir. Motion of appellee Feenstra for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 609 F. 2d 727.

Certiorari Granted

No. 79–700. WALTER FLEISHER CO., INC. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari granted.

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. Certiorari granted. Reported below: 603 F. 2d 1126.

Certiorari Denied

No. 79–390. CITY OF ANNISTON, ALABAMA, ET AL. *v.* SCOTT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 897.

No. 79–915. DOMINGUEZ *v.* BEAME, MAYOR OF NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 337.

No. 79–1141. MORA *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 368 So. 2d 1377.

No. 79–1179. BALISTRIERI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 216.

No. 79–1195. PENROD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 1092.

No. 79–1263. JAHODA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–1269. INTERNAL REVENUE SERVICE *v.* LONG ET VIR. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 362.

No. 79–1309. SEIBERT *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 423 and 599 F. 2d 743.

No. 79–1313. WARD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 599.

No. 79–1349. SABATER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 3 Kan. App. 2d 692, 601 P. 2d 11.

No. 79–1350. RUBIN ET AL. *v.* U. N. INDUSTRIES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 820.

No. 79–1355. GREENBERG, ADMINISTRATRIX *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 1213.

No. 79–1357. AMERICAN OIL CO. *v.* ARNOTT. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 873.

No. 79–1366. ST. PAUL MERCURY INSURANCE CO. ET AL. *v.* EAST WEST TOWING, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 160.

No. 79–1367. COLE *v.* LOUISIANA. 22d Jud. Dist. Ct. La., St. Tammany Parish. Certiorari denied.

No. 79–1368. MOLLURA *v.* MILLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 381.

No. 79–1369. AMERICAN MARINE CORP. ET AL. *v.* HIGHLANDS INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1101.

No. 79–1370. FETNER *v.* FEDERAL LAND BANK OF BALTIMORE. Super. Ct. Pa. Certiorari denied. Reported below: 269 Pa. Super. 455, 410 A. 2d 344.

No. 79–1371. FOSTER, DBA SNO-WHITE DRIVE IN, INC., ET AL. *v.* LAWRENCE T. LASAGNA, INC. C. A. 9th Cir. Certorari denied. Reported below: 609 F. 2d 392.

No. 79–1372. ALDENS, INC. *v.* MILLER, ATTORNEY GENERAL OF IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 538.

No. 79–1378. ROSARIO ET AL. *v.* AMALGAMATED LADIES' GARMENT CUTTERS' UNION, LOCAL 10, I.L.G.W.U., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1228.

No. 79–1452. BILLINGSLEY ET UX. *v.* LAWSON, SUBSTITUTE TRUSTEE, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 713, 406 A. 2d 946.

No. 79–1468. SEYFARTH *v.* LOVRET. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1504. LABUS ET AL. *v.* UNITED STATES; and
No. 79–1516. BRIEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 617 F. 2d 299.

No. 79–1507. BASEY *v.* UNITED STATES; and
No. 79–1526. RAMSEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 198.

No. 79–1521. BREGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 634.

No. 79–1529. AMEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–5703. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 799.

No. 79–5858. WALLS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 68, 389 N. E. 2d 6.

No. 79–5886. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 806.

No. 79–5958. SMITH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 587 S. W. 2d 659.

No. 79–5966. HUNT *v.* MARSHALL, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 372.

No. 79–5974. PROCTOR *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 152 Ga. App. 11, 262 S. E. 2d 170.

No. 79–5992. WHITE *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5993. FAIRRIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–5998. WOODS *v.* UNITED STATES; and
No. 79–6041. UNDERWOOD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 613 F. 2d 629.

No. 79–5999. ANDERSON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 42 Ore. App. 29, 599 P. 2d 1225.

No. 79–6021. ROLDAN *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 775.

No. 79–6026. JUSTICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–6039. SCOTT *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 93 Wash. 2d 7, 604 P. 2d 943.

No. 79–6139. TAYLOR *v.* ECONOMOPOULOS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 407 A. 2d 585.

No. 79–6181. WILSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 44 Md. App. 1, 408 A. 2d 102.

No. 79–6184. JACKSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 79–6198. HARRIS *v.* BARBER, JUDGE. Sup. Ct. Ore. Certiorari denied.

No. 79–6201. CARVEY *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 611 F. 2d 19.

No. 79–6202. TOWNES *v.* MITCHELL, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 79–6205. SPEED *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1310.

No. 79–6206. KICKASOLA *v.* JIM WALLACE OIL CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1371.

No. 79–6210. CHAMBERS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 42 Md. App. 756.

No. 79–6212. JONES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 591 S. W. 2d 542.

No. 79–6222. HEREFORD *v.* AJEMIAN. Ct. App. D. C. Certiorari denied.

No. 79–6223. WILLIAMS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 285 N. W. 2d 248.

No. 79–6230. SCHMANSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 575.

No. 79–6239. WRIGHT ET AL. *v.* VALLEY CENTER MUNICIPAL WATER DISTRICT. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–6251. PODRAZIK ET AL. *v.* BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 575.

No. 79–6284. WARREN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 859.

No. 79–6311. RODES *v.* BROWN, JUDGE. Sup. Ct. Ark. Certiorari denied.

No. 79–6316. BRISCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79–6320. GOODMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79–6326. WARREN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 320.

No. 79–6335. FRANCISCO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 617.

No. 79–6336. WILLIAMSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6352. PALUMBO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 608 F. 2d 529.

No. 79–6355. VENABLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–6361. COLLOM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 624.

No. 78–671. DELAWARE STATE BOARD OF EDUCATION *v.* EVANS ET AL.; and

No. 78–672. ALEXIS I. DU PONT SCHOOL DISTRICT ET AL. *v.* EVANS ET AL. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE agrees these cases merit review here but only when a full Court is available to consider the important issues presented by the petitions for certiorari. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 582 F. 2d 750.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART and MR. JUSTICE POWELL join, dissenting.

In 1971, respondents in these cases instituted an action seeking the desegregation of the schools in the city of Wilmington, Del. The litigation has now culminated in a countywide remedy more Draconian than any ever approved by this Court. The order provides for the dissolution of the county's 11 independent school boards, most of which were locally elected. In their place, the District Court "created" a single countywide school system, to be run by court-appointed officials for five years. Within this judicial school district, which comprises in excess of 60% of all the public school students in the State of Delaware, every single student will be reassigned away from his or her local school for a period of no less than three years and for as long as nine years. The plan is designed to accomplish a racial balance in each and every school, in every grade, in all of the former 11 districts, mirroring the racial balance of the total area involved.

The three-judge District Court which initially found a desegregation remedy to be warranted, expressly found that 10 of the 11 county school districts had established fully unitary school systems after this Court's decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). *Evans* v. *Buchanan*, 393 F. Supp. 428, 437, and n. 19 (Del.), summarily

aff'd, 423 U. S. 963 (1975). Only the school district in the city of Wilmington was found to have engaged in discriminatory conduct—conduct which the court did not find to be purposeful.* The court did find, however, that the acts of other governmental entities resulted in an interdistrict violation. I think this Court should grant certiorari to review the District Court's imposition of this remedy, even accepting as settled the finding that there was an interdistrict violation warranting an interdistrict remedy.

One principle that has been continually emphasized in the desegregation opinions of this Court is that the "scope of the remedy" formulated by a district court must be tailored to fit "the nature and extent of the constitutional violation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971). In order to effectively fulfill this mandate, we have made clear that district courts *must* "determine how much incremental segregative effect [the constitutional] violations had on the racial distribution of the . . . school population as . . . compared to what it would have been in the absence of such constitutional violations." *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 420 (1977). Without such a finding, it would not be possible for a judge to fulfill the equitable limitations commanded by *Swann*.

In this case, however, the courts have ignored *Swann* and

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*The three-judge court identified the Wilmington school board's adoption of voluntary attendance zones, which "although possibly designed to minimize the flight of white families with school-aged-children" to the suburbs, as possibly having the opposite effect. 393 F. Supp., at 435. Thus the court specifically recognized that the policy in question may well not have been purposefully discriminatory, even though it may have had a discriminatory effect. Even the discriminatory effect, however, was only speculative since the District Court only found that "to some extent, . . . discriminatory school policies in Wilmington *may have affected* the relative racial balance. . . ." *Id.*, at 436 (emphasis added). I am prepared to assume, *arguendo*, that this Court's summary affirmance settles the question of an interdistrict violation, however, and would review only the imposition of the remedy.

Dayton, and held that as a matter of law, no such findings were required. The District Court explicitly acknowledged that it did not apply this standard in adopting the remedy in issue. The court stated that it was "fully cognizant" that the submitted plans "were formulated without exacting consideration of whether they returned the Northern New Castle County schools to the precise position they would have assumed 'but for' the found constitutional violations." 447 F. Supp. 982, 1009 (Del. 1978). The Court of Appeals on review again conceded that the District Court did not make the inquiry identified by *Dayton* but nevertheless found this omission excusable because Wilmington had previously been subject to *de jure* segregation.

This Court has never held that a remedy dismantling local education or devising a scheme of total racial balance is warranted simply upon a finding of *de jure* segregation, and in fact, *Swann* held precisely to the contrary. Whatever the nature of the constitutional violation, the standard articulated in *Dayton*, as well as in the predecessors to *Dayton*, requires the District Court to impose changes in local education only to the extent necessary to cure the violation. The Court of Appeals' express departure from the precedents of this Court certainly warrants review.

Our cases indicate that the need for specific findings is particularly compelling when the district court seeks to impose a remedy curtailing local control of education. The District Court here has chosen such a remedy, actually *abolishing* the county's system of education and disenfranchising the voters who formerly retained popular control of education. This has been mandated even though no court has found that these local school boards have engaged in *any* purposeful discrimination since 1954. While on my assumption the absence of purpose does not negate the need for an interdistrict remedy in this case, the conduct of the boards is still relevant to the formulation of that interdistrict remedy. When the "nature of the violation" does not include purposeful discrimination on

the part of the school boards, I am not convinced that a truly "equitable" remedy would abolish those governmental entities that had not been found to purposefully participate in the perpetration of the violations. I had throught that *Milliken* v. *Bradley*, 418 U. S. 717 (1974), would forcefully preclude district courts from imposing such a remedy without the most exhaustive comparison of the nature of the violation and the need for this form of disestablishment of local government.

In *Milliken*, this Court declined to permit the federal courts to impose a remedy of this nature without the most exacting showing of necessity. The Court emphasized that "local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Id.*, at 742. The Court not only emphasized these important benefits of local control, but also recognized the inability of courts and judges to assume that role, noting that "[t]his is a task which few, if any, judges are qualified to perform. . . ." *Id.*, at 744. In *Dayton*, this Court reiterated that "local autonomy of school districts is a vital national tradition." 433 U. S., at 410. It was because of these considerations that *Dayton* insisted that "the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." *Ibid.* Yet the District Court has here treated a series of independent school districts much as if they were a "railroad in reorganization," without any attempt to comply with the requirements of *Milliken* and *Dayton*. *Alexis I. du Pont School Dist.* v. *Evans*, 439 U. S. 1375, 1379 (1978) (REHNQUIST, J., in chambers). If we have any remaining commitment to this "vital national tradition," I think this Court should be certain, before it allows the dismantling of not 1 but 11 independent school boards, that the violations

found warrant this total substitution of judicial for popular control of local education.

Thus I think the principal reason this case merits review is because there is substantial doubt that the abolition of these 11 school districts is an appropriate equitable remedy for the interdistrict violation found by the courts. In addition, I think the failure to apply *Dayton* may also have resulted in a pupil reassignment far more comprehensive and disruptive than that which the established violations warranted. My reading of the District Court opinion indicates that the court devised a remedy creating complete racial balance in every grade of every school throughout the county despite the existence of substantial residential segregation. This is a clear violation of the ruling in *Swann*. For the reasons expressed in my opinion dissenting from the denial of certiorari in *Cleveland Bd. of Ed.* v. *Reed*, 445 U. S. 935 (1980), and by MR. JUSTICE POWELL in his opinion dissenting from the dismissal of certiorari in *Estes* v. *Metropolitan Branch, Dallas NAACP*, 444 U. S. 437 (1980), I do not believe that such an assumption should go unreviewed by this Court. As in those cases, there is substantial record evidence here indicating that the classroom makeup achieved by the order would *not* exist "but for" the supposed constitutional violations. The District Court found that while 43.6% of the city of Wilmington's residents are black, only 4.5% of the county suburban residents are black. Specifically, the court found that since 1950 there had been extensive "white flight" from the city to the suburbs and that "the result of these demographic changes is that the black population of the County is heavily concentrated within the City of Wilmington." 393 F. Supp., at 432–433. The court concluded that "the residential demographic change of the past two decades has had a striking effect on the school attendance patterns in the County." *Id.*, at 433. The court did not find that these residential patterns were attributable solely (or even

principally) to governmental discrimination. Therefore to devise a remedy on the assumption that absent the constitutional violations there would be precise racial parity in the county neighborhoods is impermissible under any traditional notion of an equitable remedy to restore the situation as it would have existed prior to the assumed wrong.

This Court does a disservice to local government and the people of Delaware, and very likely in the long run to the Equal Protection Clause of the Fourteenth Amendment, by once again declining to review a case of such fundamental importance.

No. 78–1260. MOFFITT, UNITED STATES MARSHAL, ET AL. *v.* LOE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 582 F. 2d 1291.

No. 79–54. CITY OF LOS ANGELES ET AL. *v.* BLAKE ET AL. C. A. 9th Cir. Motion of Los Angeles Police Protective League for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 595 F. 2d 1367.

No. 79–1018. DELAY *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 70 Ill. App. 3d 712, 388 N. E. 2d 1316.

No. 79–1247. BOARD OF TRADE OF CHICAGO *v.* COMMODITY FUTURES TRADING COMMISSION. C. A. 7th Cir. Motions of Mid-America Commodity Exchange et al., Coffee, Sugar & Cocoa Exchange, Inc., and Chicago Mercantile Exchange for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 605 F. 2d 1016.

No. 79–1387. MINSON *v.* CHRYSLER CORP. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 612 F. 2d 1308.

No. 79–1382. SWITLIK ET AL. *v.* HARDWICKE CORP. ET AL. Super. Ct. N. J. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 79–1383. GANT ET AL. *v.* UNION BANK ET AL. C. A. 9th Cir. Motion of International Business Machines Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this motion and petition. Reported below: 609 F. 2d 411.

No. 79–1396. INTERNATIONAL BUSINESS MACHINES CORP. *v.* GREYHOUND COMPUTER CORP. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 79–1636. WINPISINGER ET AL. *v.* WATSON ET AL. C. A. D. C. Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari granted. Certiorari denied. Reported below: 202 U. S. App. D. C. 133, 628 F. 2d 133.

No. 79–5987. JOLLY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 298 N. C. 573, 260 S. E. 2d 629.

No. 79–6229. HUETER *v.* LUTHERAN SOCIAL SERVICES OF CENTRAL OHIO ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari.

Rehearing Denied

No. 79–1039. WILLIAM C. HAAS & CO., INC. *v.* CITY AND COUNTY OF SAN FRANCISCO, 445 U. S. 928;

No. 79–5626. SIMON *v.* TEXAS ET AL., 445 U. S. 938; and

No. 79–5863. GODWIN *v.* UNITED STATES, 445 U. S. 932. Petitions for rehearing denied.

No. 79–6014. HERNANDEZ *v.* ELIO M. ROSSY, INC., ET AL., 445 U. S. 933. Petition for rehearing denied.

APRIL 29, 1980

*Miscellaneous Order**

MAY 12, 1980

Appointment of Chief Deputy Clerk

It is ordered that Alexander L. Stevas be, and he is hereby, appointed Chief Deputy Clerk of this Court, effective Monday, June 9, 1980.

Affirmed on Appeal

No. 79–6108. ARMOUR ET AL. *v.* NIX ET AL. Affirmed on appeal from D. C. N. D. Ga. MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS would dismiss the appeal for want of jurisdiction. MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

Appeals Dismissed

No. 79–492. FUNGAROLI *v.* FUNGAROLI. Ct. App. N. C. [Probable jurisdiction noted, 444 U. S. 1031.†] Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 40 N. C. App. 397, 252 S. E. 2d 849.

No. 79–1233. STUCKEY'S STORES, INC. *v.* O'CHESKEY, CHIEF HIGHWAY ADMINISTRATOR OF NEW MEXICO. Appeal from Sup. Ct. N. M. dismissed for want of substantial federal question. Reported below: 93 N. M. 312, 600 P. 2d 258.

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*For the Court's order prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. 997.

†[REPORTER'S NOTE: The case was argued April 16, 1980. *John F. Morrow* argued the cause and filed a brief for appellant. *B. Ervin Brown II* argued the cause and filed a brief for appellee.]

No. 79–1453. BREWSTER *v.* CITY OF CARBONDALE. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 78 Ill. 2d 111, 398 N. E. 2d 829.

No. 79–1474. AMERICAN AMUSEMENT CO., INC., ET AL. *v.* DEPARTMENT OF REVENUE OF MICHIGAN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 91 Mich. App. 573, 283 N. W. 2d 803.

No. 79–1495. SAPPINGTON *v.* BECKERT, JUDGE, ET AL. Appeal from Super. Ct. Pa. dismissed for want of substantial federal question.

No. 79–1497. ALFREE *v.* ALFREE. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 410 A. 2d 161.

No. 79–1325. CLARK *v.* INDIANA ET AL. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: —— Ind. ——, 397 N. E. 2d 580.

No. 79–6237. RODRIGUES *v.* CITY OF SPARKS, NEVADA, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6261. JAFFER *v.* CITY OF MIAMI ET AL. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 381 So. 2d 764.

Certiorari Granted—Vacated and Remanded

No. 77–6595. WILLIAMS *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pau-*

peris and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Baldasar* v. *Illinois, ante,* p. 222. Reported below: 294 N. C. 187, 241 S. E. 2d 73.

No. 79–1465. CALIFORNIA *v.* BRAESEKE. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to consider whether judgment is based on federal or state constitutional grounds, or both. *California* v. *Krivda,* 409 U. S. 33 (1972). Reported below: 25 Cal. 3d 691, 602 P. 2d 384.

No. 79–6149. SCHEER *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his memorandum filed April 15, 1980. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent. Reported below: 614 F. 2d 771.

No. 79–6182. GRAHAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Payton* v. *New York,* 445 U. S. 573 (1980). Reported below: 69 App. Div. 2d 544, 419 N. Y. S. 2d 290.

Miscellaneous Orders

No. A–886. MELECHINSKY *v.* UNITED STATES. Application for stay of execution of sentence, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–890. WALTHAL *v.* TEXAS. Application for stay of mandate of the Court of Criminal Appeals of Texas, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D–182. In re Disbarment of Blondes. Disbarment entered. [For earlier order herein, see 444 U. S. 977.]

No. D–191. In re Disbarment of Schilpp. It is ordered that Thomas F. Schilpp, of Lansdowne, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–192. In re Disbarment of Crumpacker. It is ordered that Owen W. Crumpacker, of Valparaiso, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 78–1851. Harris *v.* H. Schuldt Reederei, 444 U. S. 839. Respondent is invited to file a response to the petition for rehearing within 30 days.

No. 79–1362. American Fidelity Life Insurance Co. et al. *v.* Alabama Farm Bureau Mutual Casualty Insurance Co., Inc. C. A. 5th Cir.;

No. 79–1406. City of Los Angeles *v.* Greater Westchester Homeowners Assn. et al. Sup. Ct. Cal.;

No. 79–1423. Western & Southern Life Insurance Co. *v.* State Board of Equalization of California. Appeal from Ct. App. Cal., 2d App. Dist.; and

No. 79–1469. Cose *v.* Cose. Sup. Ct. Alaska. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–5601. Gomez *v.* Toledo. C. A. 1st Cir. [Certiorari granted, 444 U. S. 1031.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 79–5962. VINCENT *v.* TEXAS. Ct. Crim. App. Tex. [Probable jurisdiction postponed, 445 U. S. 960.] Motion for appointment of counsel granted, and it is ordered that Robert D. McCutcheon, Esquire, of Perryton, Tex., be appointed to serve as counsel for appellant in this case.

No. 79–6278. PLUMLEE *v.* FIELDS, WARDEN;

No. 79–6417. TURNER *v.* GRAHAM, GOVERNOR OF FLORIDA, ET AL.; and

No. 79–6421. CLEVELAND *v.* WARDEN, MARYLAND PENITENTIARY. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 79–512. SCINDIA STEAM NAVIGATION CO., LTD. *v.* DE LOS SANTOS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 598 F. 2d 480.

No. 79–1420. FIRESTONE TIRE & RUBBER CO. *v.* RISJORD. C. A. 8th Cir. Certiorari granted. Reported below: 612 F. 2d 377.

No. 79–1515. UNITED STATES *v.* SWANK ET AL. Ct. Cl. Certiorari granted. Reported below: 221 Ct. Cl. 246, 602 F. 2d 348.

No. 79–1176. CITY OF MEMPHIS ET AL. *v.* GREENE ET AL. C. A. 6th Cir. Motion of Hein Park Civic Association for leave to file a brief as *amicus curiae* granted. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 610 F. 2d 395.

Certiorari Denied. (See also Nos. 79–492, 79–6237, and 79–6261, *supra.*)

No. 79–989. FREDERICK JOSEPH G. *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 353, 157 Cal. Rptr. 769.

No. 79–1092. ABERCROMBIE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 375 So. 2d 1170.

No. 79–1147. APPALACHIAN POWER CO. ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 398, 607 F. 2d 935.

No. 79–1164. LICAVOLI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 613.

No. 79–1184. HOLLOWAY ET AL. *v.* UNITED STATES; and
No. 79–1194. SPIEGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 961.

No. 79–1187. FOX *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–1192. FOREST E. OLSON, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 96 Cal. App. 3d 181, 157 Cal. Rptr. 628.

No. 79–1216. SYROVATKA ET UX. *v.* EHRLICH, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE OF NEBRASKA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 307.

No. 79–1221. GRZYWACZ ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 682.

No. 79–1235. NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., DBA INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS *v.* CENTRAL BROADCASTING CORP. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 379 Mass. 220, 396 N. E. 2d 996.

No. 79–1238. BRIGGS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79–1241. ASHLAND OIL, INC. *v.* PHILLIPS PETROLEUM CO. ET AL.; and

No. 79–1250. PHILLIPS PETROLEUM CO. *v.* ASHLAND OIL, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 607 F. 2d 335.

No. 79–1244. FALKOWSKI *v.* PERRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1051.

No. 79–1251. HARRIS, KERR, FORSTER & CO. *v.* SPECTRUM FINANCIAL COS. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 377.

No. 79–1282. PATRICK PETROLEUM CORPORATION OF MICHIGAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 542.

No. 79–1296. COMO-FALCON COMMUNITY COALITION, INC. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 342.

No. 79–1297. VICTORSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1010.

No. 79–1304. CITY OF NEW YORK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79–1305. LUTHERAN MUTUAL LIFE INSURANCE CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 77, 602 F. 2d 328.

No. 79–1310. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1301.

No. 79–1311. CHUTE, ADMINISTRATOR, ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 610 F. 2d 7.

No. 79–1316. ESTELLE, CORRECTIONS DIRECTOR *v.* PASSMORE; and

No. 79–6138. PASSMORE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 115 and 607 F. 2d 662.

No. 79–1321. JAIN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 683.

No. 79–1323. QUINONES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 613 F. 2d 47.

No. 79–1326. HESS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79–1334. HAYDEN ET UX. *v.* NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 224, 608 F. 2d 1381.

No. 79–1365. DEPARTMENT OF ENERGY ET AL. *v.* MOBIL OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 610 F. 2d 796.

No. 79–1391. BAGNELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–1398. LERMAN *v.* INHABITANTS OF THE CITY OF PORTLAND. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 406 A. 2d 903.

No. 79–1402. YOUNG ET AL. *v.* DISTINCTIVE DEVICES, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 792, 415 N. Y. S. 2d 917.

No. 79–1403. PEREZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 590 S. W. 2d 474.

No. 79–1407. GRIFFIN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 744.

No. 79–1409. LUETKEMEYER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 74 Ill. App. 3d 708, 393 N. E. 2d 117.

No. 79–1411. BUSHONG *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 267 Ark. 113, 589 S. W. 2d 559.

No. 79–1412. CROSMAN *v.* LONG ISLAND UNIVERSITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 650, 417 N. Y. S. 2d 207.

No. 79–1417. BARTHOLOMEW ET AL. *v.* VIRGINIA CHIROPRACTORS ASSN., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 812.

No. 79–1418. GLOBE PAPER CO. *v.* LINDLEY, TAX COMMISSIONER OF OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 63 Ohio App. 2d 180, 410 N. E. 2d 804.

No. 79–1421. DESIGN & MANUFACTURING CORP. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 608 F. 2d 767.

No. 79–1440. ADAMIAN *v.* LOMBARDI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1224.

No. 79–1441. FORAKER *v.* OHIO. Ct. App. Ohio, Licking County. Certiorari denied.

No. 79–1449. KENTUCKY STATE BOARD FOR ELEMENTARY AND SECONDARY EDUCATION ET AL. *v.* RUDASILL ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 589 S. W. 2d 877.

No. 79–1461. MEYER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 427, 406 A. 2d 427.

No. 79–1470. LEHMAN BROTHERS INC. *v.* LILLY ET AL.; and

No. 79–1471. STATE TEACHERS RETIREMENT SYSTEM OF OHIO PENSION FUND *v.* LILLY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 55.

No. 79–1472. CASHIN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–1475. HARRIGILL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 381 So. 2d 619.

No. 79–1477. DIMAURO *v.* PAVIA ET AL., DBA PAVIA & HARCOURT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79–1478. ELLIPSE CORP. *v.* FORD MOTOR CORP. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 775.

No. 79–1518. DAVIS *v.* INTERNATIONAL UNION OF CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN & HELPERS, LOCAL 135, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

No. 79–1520. FIELD ET AL. *v.* BROWN, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 39, 610 F. 2d 981.

No. 79–1531. LARKIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 1360 and 611 F. 2d 585.

No. 79–1536. ROMANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79–1546. LAYFIELD *v.* BILL HEARD CHEVROLET CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1097.

No. 79–1564. KING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1164.

No. 79–1579. BECK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–1582. COLEMAN, AKA COLEMAN-BEY, ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 511.

No. 79–1585. TENCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1358.

No. 79–1589. SANTOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 613 F. 2d 1205.

No. 79–1603. PEIFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79–5839. HINES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79–5948. PRESTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 626.

No. 79–5953. SPICER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 79 Ill. 2d 173, 402 N. E. 2d 169.

No. 79–5954. RUBIES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 397.

No. 79–5969. CALLABRASS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 559.

No. 79–5980. YOUNG *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 407 A. 2d 517.

No. 79–5985. SALAAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–5996. PEERY *v.* SIELAFF, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 615 F. 2d 402.

No. 79–6002. PRADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 603.

No. 79–6020. BROWN ET AL. *v.* SCHIFF ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 614 F. 2d 237.

No. 79–6033. WISCHNEWSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79–6037. ARMSTRONG *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 505.

No. 79–6049. REYNOLDS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 298 N. C. 380, 259 S. E. 2d 843.

No. 79–6055. HEITMAN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 589 S. W. 2d 249.

No. 79–6067. MCKETHAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6073. GREEN *v.* SUMMERS. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 810.

No. 79–6080. CHERRY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 298 N. C. 86, 257 S. E. 2d 551.

No. 79–6093. RILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1363.

No. 79–6129. PAQUETTE *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–6142. PAUL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 115.

No. 79–6163. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–6176. ENSMINGER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 189.

No. 79–6180. RAYSOR *v.* STERN, ADMINISTRATOR, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 68 App. Div. 2d 786, 418 N. Y. S. 2d 713.

No. 79–6191. BETANCOURT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 590 S. W. 2d 487.

No. 79–6203. WERNERT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79–6228. WATERS *v.* NEW YORK; and
No. 79–6235. QUAMINA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 48, 399 N. E. 2d 1177.

No. 79–6232. SNYDER *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 104.

No. 79–6240. ROSS *v.* JONES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79–6244. HENRYHAND *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6247. FRENCH *v.* BUTTERWORTH, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 614 F. 2d 23.

No. 79–6248. MA *v.* HAZELWOOD ET AL. Ct. App. Wis. Certiorari denied. Reported below: 90 Wis. 2d 864, 280 N. W. 2d 786.

No. 79–6249. HOOTEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 250, 264 S. E. 2d 192.

No. 79–6257. TURNAGE *v.* MCCARTHY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79–6258. WILEY *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 473.

No. 79–6260. WALKER *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 79–6262. JAFFER *v.* ONGIE, CLERK, CITY OF MIAMI. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 169.

No. 79–6264. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 79–6266. MORGAN *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79–6270. WILLIAMS *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1293.

No. 79–6271. JENKINS *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 162.

No. 79–6275. PRICE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 60 Ohio St. 2d 136, 398 N. E. 2d 772.

No. 79–6280. FELTINGTON *v.* MOVING PICTURE MACHINE OPERATORS UNION LOCAL 306 OF I.A.T.S.E. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1251.

No. 79–6282. MOORE *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 286 N. W. 2d 274.

No. 79–6287. PORTER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–6288. CLARK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 270 Pa. Super. 441, 411 A. 2d 800.

No. 79–6289. JACOBS *v.* REDMAN, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 616 F. 2d 1251.

No. 79–6291. DEMARBIEX *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 79–6292. GUZMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 79–6293. LUCK *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 588 S. W. 2d 371.

No. 79–6294. MCDANIEL *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79–6298. DIOQUINO *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–6303. TILLMAN *v.* FAUVER, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–6310. PRENZLER *v.* PIKE ET AL. Sup. Ct. Cal. Certiorari denied.

No. 79–6315. CHEEK *v.* BATES. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 559.

No. 79–6354. PICKING *v.* HUGHES, GOVERNOR OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79–6364. GUANAJUATO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79–6368. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1349.

No. 79–6369. SAUNDERS-EL *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–6371. GOSNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79–6375. MALLOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79–6378. VARKONYI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 84.

No. 79–6388. DEJEAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1356.

No. 79–6391. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–6397. CAMERON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 313.

No. 79–6398. BURRUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6406. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 80.

No. 79–6411. MEARS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 614 F. 2d 1175.

No. 79–6418. PLEXICO *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–6424. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 117.

No. 79–6426. COLVIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 44.

No. 79–1200. OREGON *v.* HAYNES. Sup. Ct. Ore. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 288 Ore. 59, 602 P. 2d 272.

No. 79–1303. CHICAGO TRANSIT AUTHORITY *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 607 F. 2d 1284.

No. 79–1416. RANDALL *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 285 N. W. 2d 161.

No. 79–6207. SPRADLIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 615 F. 2d 1358.

No. 79–1428. A. H. ROBINS CO., INC., ET AL. *v.* ROSS ET AL. C. A. 2d Cir. Motions of American Institute of Certified Public Accountants and Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions and this petition. Reported below: 607 F. 2d 545.

No. 79–1439. REICH ET AL. *v.* REED TOOL CO. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Petition for writ of certiorari denied as untimely filed. Reported below: 582 S. W. 2d 549.

No. 79–1450. CHAPMAN *v.* CITY OF TALLMADGE. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

No. 79–6029. THORNE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari.

No. 79–6188. MOORE *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County. Certiorari denied.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 78–904. DEPOSIT GUARANTY NATIONAL BANK OF JACKSON, MISSISSIPPI *v.* ROPER ET AL., 445 U. S. 326;

No. 78–1472. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* PACIFIC LEGAL FOUNDATION ET AL., 445 U. S. 198;

No. 78–1588. VANCE ET AL. *v.* UNIVERSAL AMUSEMENT CO., INC., ET AL., 445 U. S. 308;

No. 79–812. OSMOSE WOOD PRESERVING CO. OF AMERICA, INC., ET AL. *v.* CITY OF LOS ANGELES, 445 U. S. 950;

No. 79–1031. SOUTHWEST TEXAS METHODIST HOSPITAL *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 445 U. S. 928;

No. 79–1143. RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC. *v.* MIKOS, PROPERTY APPRAISER OF SARASOTA COUNTY, FLORIDA, ET AL., 445 U. S. 939;

No. 79–1298. UNKNOWN NAMED CHILDREN UNBORN AND BORN ALIVE *v.* GREENE, U. S. DISTRICT JUDGE, 445 U. S. 941;

No. 79–5662. FEASTER *v.* MARYLAND, 445 U. S. 917;

No. 79–5820. KLOBUCHIR *v.* PENNSYLVANIA, 445 U. S. 952;

No. 79–6028. LOCKETT *v.* SOUTH CENTRAL BELL TELEPHONE CO., 445 U. S. 944; and

No. 79–6036. FROEMBGEN *v.* UNITED STATES, 445 U. S. 933. Petitions for rehearing denied.

No. 79–6088. PROSAK *v.* BOEING CO. ET AL., 445 U. S. 934; and

No. 79–6103. CAMPBELL *v.* UNITED STATES, 445 U. S. 945. Petitions for rehearing denied.

MAY 15, 1980

Dismissal Under Rule 60

No. 79–6307. JOHNSON *v.* WASHINGTON. Sup. Ct. Wash. Certiorari dismissed under this Court's Rule 60. Reported below: 92 Wash. 2d 671, 600 P. 2d 1249.

MAY 19, 1980

Appeals Dismissed

No. 79–1169. BERGER *v.* BERGER. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–1508. BROWN *v.* UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 614 F. 2d 774.

No. 79–6305. DI FALCO *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–6328. PRENZLER *v.* PIKE ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–1434. MANDEL ET AL. *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 48 N. Y. 2d 952, 401 N. E. 2d 185.

No. 79–1513. DENGLER *v.* ATTORNEY GENERAL OF MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 287 N. W. 2d 637.

Certiorari Granted—Vacated and Remanded

No. 79–1156. MILLER, SECRETARY OF THE TREASURY, ET AL. *v.* CASTLEWOOD INTERNATIONAL CORP. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). Reported below: 596 F. 2d 638.

Miscellaneous Orders

No. A–969. ANDREWS *v.* MORRIS, WARDEN. Sup. Ct. Utah. Application for stay of execution of sentence of death, presented to MR. JUSTICE WHITE, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari.

No. 79–1738. NIXON *v.* FITZGERALD. C. A. D. C. Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion.

No. A–947 (79–1752). ADAMS ET AL. *v.* UNITED STATES ET AL. Application for stay of judgment of the United States Court of Appeals for the Eighth Circuit, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A–951 (79–1763). CHLORINE INSTITUTE, INC., ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit, presented to MR. JUSTICE POWELL, and by him referred to the Court, granted except as to the employers' obligation to provide respirators to employees exposed to chlorine concentrations in excess of 1 ppm, pending disposition of the petition for writ of certiorari.

No. 79–6353. SIMON *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT;

No. 79–6392. SIMON *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT;

No. 79–6399. DELESPINE *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT; and

No. 79–6465. PAUL *v.* HERMANSDORFER, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 79–1645. CANTER *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. (UNITED STATES, REAL PARTY IN INTEREST). Motion for leave to file petition for writ of mandamus and/or other relief denied.

Probable Jurisdiction Noted

No. 79–1320. KASSEL, DIRECTOR OF TRANSPORTATION, ET AL. *v.* CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 612 F. 2d 1064.

Certiorari Granted

No. 79–5269. EDWARDS *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 122 Ariz. 206, 594 P. 2d 72.

No. 79–880. KISSINGER ET AL. *v.* HALPERIN ET AL. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 196 U. S. App. D. C. 285, 606 F. 2d 1192.

No. 79–1336. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* KALO BRICK & TILE CO. Ct. App. Iowa. Certiorari granted. Reported below: 295 N. W. 2d 467.

No. 79–6027. WOOD ET AL. *v.* GEORGIA. Ct. App. Ga. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 150 Ga. App. 582, 258 S. E. 2d 171.

Certiorari Denied. (See also Nos. 79–1169, 79–1434, 79–1508, 79–6305, and 79–6328, *supra.*)

No. 78–492. NEVETT ET AL. *v.* SIDES, MAYOR OF FAIRFIELD, ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 571 F. 2d 209.

No. 79–1175. WM. T. BURNETT & CO., INC. *v.* GENERAL TIRE & RUBBER CO. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 512.

No. 79–1181. HERNANDEZ *v.* FLORIDA; and
No. 79–1210. EDER ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 369 So. 2d 76.

No. 79–1193. ARANDA ET AL. *v.* VAN SICKLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 1267.

No. 79–1217. UZZELL ET AL. *v.* FRIDAY ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–1245. ACAVINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–1253. OPERATING ENGINEERS PENSION TRUST *v.* LIONBERGER. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 97 Cal. App. 3d 56, 158 Cal. Rptr. 535.

No. 79–1262. GENERAL MOTORS CORP. ET AL. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 201 U. S. App. D. C. 109, 627 F. 2d 1095.

No. 79–1276. BUCCHINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 590.

No. 79–1318. LIBERTI ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 34.

No. 79–1345. KORMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 541.

No. 79–1346. MUNOZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79–1359. WEST *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1224.

No. 79–1393. COURTWRIGHT ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 795.

No. 79–1473. MENDOZA-ALVAREZ *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 561.

No. 79–1486. HARE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 377 So. 2d 1143.

No. 79–1492. MOORE *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 307.

No. 79–1505. DREBIN ET AL. *v.* RUSSELL, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 1123.

No. 79–1506. LAGUTA ET AL. *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 79–1510. TUCKER *v.* ANDERSON. C. A. 2d Cir. Certiorari denied.

No. 79–1511. ARCHER *v.* AIRLINE PILOTS ASSN., INTERNATIONAL. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 934.

No. 79–1512. WESTOVER ET VIR *v.* TOLEDO. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 171.

No. 79–1533. W. R. GRACE & Co., INC. *v.* E-T INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1214.

No. 79–1569. YANKTON SIOUX TRIBE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 222 Ct. Cl. 421, 616 F. 2d 485.

No. 79–1573. BERGEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 443.

No. 79–1578. CALDWELL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 611 F. 2d 881.

No. 79–1591. RODGERS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 594 S. W. 2d 273.

No. 79–1609. HANIGAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–1632. PROVENZANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 615 F. 2d 37.

No. 79–1633. MARINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 622 F. 2d 576.

No. 79–1634. STARR ET AL *v.* NIXON, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–1638. HOGBERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 79–1648. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 114.

No. 79–1651. GARNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6016. JONES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 689, 261 S. E. 2d 629.

No. 79–6031. MOORE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 296, 613 F. 2d 1029.

No. 79–6058. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79–6123. KAMPILES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 609 F. 2d 1233.

No. 79–6193. ALMENDAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79–6204. QUATERMAIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 613 F. 2d 38.

No. 79–6265. CHIODO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 286.

No. 79–6274. MOORMAN *v.* DAVIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1203.

No. 79–6318. MCMILLON *v.* PADGETT, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 313.

No. 79–6319. WILLIAMSON *v.* HINTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 107.

No. 79–6323. CAVER *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1352.

No. 79–6324. CEPEDA *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–6334. ATTWELL *v.* UNDERCOFLER, CHIEF JUSTICE, SUPREME COURT OF GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 228.

No. 79–6343. STOREY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 378 Mass. 312, 391 N. E. 2d 898.

No. 79–6344. HEBERT *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1360.

No. 79–6389. DUNN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79–6415. IRVIN *v.* CATALANO, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 603.

No. 79–6427. DOBSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 840.

No. 79–6428. BROADWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 1349.

No. 79–6430. DECAMBRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 615 F. 2d 1367.

No. 79–6433. LEIB *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 92, 612 F. 2d 587.

No. 79–6435. HAWKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 85.

No. 79–6437. COLEMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 620 F. 2d 290.

No. 79–6450. YOUNG *v.* BALTIMORE COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 815.

No. 79–6463. SHORT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 617 F. 2d 604.

No. 79–6469. WEATHERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 618 F. 2d 663.

No. 79–907. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO *v.* NOLAN. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 603 F. 2d 810.

No. 79–1105. MOUNTAIN LAUREL RACING, INC., ET AL. *v.* FITZGERALD. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 607 F. 2d 589.

No. 79–1222. AMERICAN GEMS, INC. *v.* MESSER, ADMINISTRATRIX. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 612 F. 2d 1367.

No. 79–1228. IVY ET AL. *v.* SECURITY BARGE LINES, INC. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 606 F. 2d 524.

No. 79–1482. DoCARMO, ADMINISTRATOR *v.* F. V. PILGRIM I CORP. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 612 F. 2d 11.

No. 79–6217. WARREN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 578 F. 2d 1058 and 612 F. 2d 887.

No. 79–1476. STARLEY *v.* CITY OF BIRMINGHAM. Ct. Crim. App. Ala. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 377 So. 2d 1131.

No. 79–1258. CONFEDERATION OF IRANIAN STUDENTS *v.* CIVILETTI, ATTORNEY GENERAL; and

No. 79–1270. NARENJI ET AL. *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 199 U. S. App. D. C. 163, 617 F. 2d 745.

No. 79–1259. TORCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 609 F. 2d 1088.

No. 79–1386. UNITED STATES POSTAL SERVICE *v.* UNITED PARCEL SERVICE, INC., ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 604 F. 2d 1370.

No. 79–1466. BLACKBURN, WARDEN *v.* MONROE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 607 F. 2d 148.

No. 79–1491. SEYMOUR ET AL., TRUSTEES *v.* COUGHLIN CO. C. A. 9th Cir. Motion of International Union of Operating Engineers, Local Union No. 12, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 609 F. 2d 346.

No. 79–6177. RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 618 F. 2d 93.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

In December 1976 petitioner was indicted for possessing with intent to distribute one kilogram of heroin, in violation of 21 U. S. C. § 841 (a)(1). He was tried, convicted, and sentenced to 12 years in prison and a 3-year special parole term. Subsequently, petitioner was indicted for con-

spiracy to distribute the same kilogram of heroin, in violation of 21 U. S. C. § 846. He pleaded guilty to the second charge and was sentenced to 14 years in prison and a 3-year special parole term to be served concurrently with the first sentence. Petitioner challenged the second conviction under 28 U. S. C. § 2255, alleging that it was barred by the Double Jeopardy Clause. The District Court denied relief, and the Court of Appeals affirmed.

Indictments for conspiracy and for the underlying substantive offense are indictments arising out of the same criminal transaction. *Dempsey* v. *United States*, 423 U. S. 1079 (1976) (BRENNAN, J., dissenting); *Ciuzio* v. *United States*, 416 U. S. 995 (1974) (BRENNAN, J., dissenting). Therefore, I would grant the petition for certiorari and remand with directions that the writ of habeas corpus be granted and the second conviction vacated. I adhere to my view that the Double Jeopardy Clause requires prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

No. 79–6242. JERNIGAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 377 So. 2d 1222.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The New Orleans, La., police received an anonymous telephone call informing them that a black male wearing a yellow shirt and blue pants and armed with a handgun could be found sitting in Sander's Bar. A radio dispatch went out, and Officer Williams proceeded to the bar. Of the 10 or 12 persons in the bar, petitioner was the only one wearing a yellow shirt and blue pants. Officer Williams approached petitioner, directed him to stand, and frisked him. The

officer detected a gun in petitioner's pants pocket; he removed a .38-caliber revolver and arrested petitioner who was charged with violation of Louisiana law by possession of a firearm after having been previously convicted of a felony.

In sustaining the trial court's denial of petitioner's motion to suppress the gun as illegally seized, the Louisiana Supreme Court noted that the Fourth Amendment would render the evidence inadmissible if the officer did not have sufficient knowledge of facts and circumstances to amount to reasonable cause for an investigatory detention. The court also noted that *Adams* v. *Williams*, 407 U. S. 143 (1972), recognized that an informer's tip can provide a police officer with reasonable cause to detain and question a suspect. But the court noted further the difference between this case and *Adams*, for the narrow issue presented here was whether an informer's tip could provide reasonable cause if the tip was anonymous. According to the court, if the information received from the anonymous tipster carried enough indicia of reliability, such as specificity of the information and corroboration by independent police work, the anonymous tip was sufficient. Moreover, prompt police action was justified where the information would indicate an immediate and real danger to the public.

We have not directly decided whether an anonymous tip may furnish reasonable suspicion for a stop and frisk. We have emphasized the specificity of the information provided, the independent corroboration by the police officer, and the danger to the public. See, *e. g.*, *Adams*, *supra*; *Draper* v. *United States*, 358 U. S. 307 (1959). But in the decided cases, these factors were not the only indicia of reliability. The informers in *Adams* and *Draper* were known to the officer and were known to have provided reliable information in the past. The same cannot be said of an anonymous tipster.

Arguably, the decision of the Louisiana Supreme Court is inconsistent with our prior cases which require that reason-

able suspicion be based on a sufficiently reliable informer's tip. I would grant certiorari for this reason and also because the reliability of an anonymous or unidentified tipster is an issue that has divided the Federal Courts of Appeals. Compare *United States* v. *McLeroy*, 584 F. 2d 746 (CA5 1978), and *United States* v. *Robinson*, 536 F. 2d 1298 (CA9 1976) (no reasonable suspicion), with *United States* v. *Hernandez*, 486 F. 2d 614 (CA7 1973) (*per curiam*) (reasonable suspicion), cert. denied, 415 U. S. 959 (1974). See also *United States* v. *Gorin*, 564 F. 2d 159 (CA4 1977), cert. denied, 434 U. S. 1080 (1978), and *United States* v. *Unverzagt*, 424 F. 2d 396 (CA8 1970) (identity of informer known but no proof of his reliability; reasonable suspicion found). The state courts are similarly divided. Accordingly, I dissent from the denial of certiorari.

Rehearing Denied

No. 79–5940. TURNER *v.* MITCHELL, WARDEN, 445 U. S. 966;

No. 79–6057. GRAY *v.* UNITED STATES, *ante*, p. 911;

No. 79–6092. LILLIBRIDGE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 445 U. S. 967;

No. 79–6171. ATTWELL ET AL. *v.* LASALLE NATIONAL BANK ET AL., 445 U. S. 954;

No. 79–6178. BOALBEY *v.* KINDRED, *ante*, p. 912; and

No. 79–6186. NOE *v.* CIVILETTI, ATTORNEY GENERAL, ET AL., 445 U. S. 969. Petitions for rehearing denied.

MAY 22, 1980

Dismissals Under Rule 60

No. 78–1653. NORTH CAROLINA WILDLIFE RESOURCES COMMISSION ET AL. *v.* EASTERN BAND OF CHEROKEE INDIANS. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 588 F. 2d 75.

No. 79–1237. PHILLIPS *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed under this Court's Rule 60. Reported below: 588 S. W. 2d 378.

MAY 27, 1980

Appeals Dismissed

No. 79–1340. HODGES TRANSFER CO., INC., ET AL. *v.* ALABAMA PUBLIC SERVICE COMMISSION ET AL. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 376 So. 2d 680.

No. 79–1606. CARTER *v.* KANSAS CITY, MISSOURI. Appeal from Ct. App. Mo., Western District, dismissed for want of substantial federal question. Reported below: 591 S. W. 2d 132.

No. 79–1549. GEECK ET AL. *v.* CITY OF NEW ORLEANS ET AL. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 377 So. 2d 1206.

Certiorari Granted—Reversed and Remanded. (See No. 79–1101, *ante*, p. 643.)

Certiorari Granted—Vacated and Remanded

No. 78–6891. DAVIS *v.* GEORGIA;
No. 79–5032. SPRAGGINS *v.* GEORGIA;
No. 79–5188. COLLINS *v.* GEORGIA;
No. 79–5567. BAKER *v.* GEORGIA;
No. 79–5904. HAMILTON *v.* GEORGIA; and
No. 79–6330. BROOKS *v.* GEORGIA. Sup. Ct. Ga. Motions of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgments vacated insofar as they leave undisturbed the death penalties imposed, and cases remanded for further consideration in light of *Godfrey* v. *Georgia*, *ante*,

p. 420. Reported below: No. 78–6891, 242 Ga. 901, 252 S. E. 2d 443; No. 79–5032, 243 Ga. 73, 252 S. E. 2d 620; No. 79–5188, 243 Ga. 291, 253 S. E. 2d 729; No. 79–5567, 243 Ga. 710, 257 S. E. 2d 192; No. 79–5904, 244 Ga. 145, 259 S. E. 2d 81; No. 79–6330, 244 Ga. 574, 261 S. E. 2d 379.

No. 79–1243. HARRIS, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* BERMUDEZ ET AL. C. A. 2d Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante,* p. 335. Reported below: 614 F. 2d 1285.

No. 79–1462. MCGUIRE, POLICE COMMISSIONER OF NEW YORK CITY *v.* LEIGH ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Board of Regents* v. *Tomanio, ante,* p. 478. Reported below: 613 F. 2d 380.

No. 79–1565. MISSOURI *v.* SOURS. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Whalen* v. *United States,* 445 U. S. 684 (1980). Reported below: 593 S. W. 2d 208.

No. 79–5790. BROWN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante,* p. 335. Reported below: 605 F. 2d 561.

No. 79–5995. SMITH *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan, ante,* p. 335. Reported below: 611 F. 2d 374.

No. 79–6376. BARNETT *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Cuyler* v. *Sullivan*, *ante*, p. 335.

Miscellaneous Orders

No. A–941. EGBERT *v.* KANSAS. Application for stay of mandate of the Supreme Court of Kansas, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–979. BOARD OF EDUCATION OF THE CITY OF DETROIT ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. Application for stay of mandate of the United States Court of Appeals for the Sixth Circuit, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied. The order entered by MR. JUSTICE STEWART on May 14, 1980, is vacated.

No. D–193. IN RE DISBARMENT OF LEACH. It is ordered that Fred L. Leach, of Amarillo, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79–816. POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. [Certiorari granted, 444 U. S. 1069.] Motion of petitioner to dispense with printing appendix granted.

No. 79–6370. ABLE ET UX. *v.* DELAWARE. Appeal from Sup. Ct. Del. Motion of appellants to seal the record granted.

No. 79–1451. PFISTER *v.* DELTA AIR LINES, INC., ET AL. Motion for leave to file petition for writ of certiorari and for other relief denied.

Probable Jurisdiction Noted

No. 79–1380. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WILSON ET AL. Appeal from D. C. N. D. Ill. Probable jurisdiction noted. Reported below: 478 F. Supp. 1046.

Certiorari Denied

No. 79–646. PARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1000.

No. 79–795. MEDINA-HERRERA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 770.

No. 79–1256. TURLOCK IRRIGATION DISTRICT ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO; and

No. 79–1479. UNITED AIR LINES, INC., ET AL. *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 616 F. 2d 1063.

No. 79–1273. RUMAN *v.* DEPARTMENT OF REVENUE OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 574.

No. 79–1289. CHANEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79–1299. FITZGERALD, PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK *v.* AMERICAN TRADING & PRODUCTION CORP. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 843, 400 N. E. 2d 366.

No. 79–1384. EXXON CORP. *v.* UNITED STATES;

No. 79–1394. SHELL OIL CO. *v.* UNITED STATES; and

No. 79–1395. MARATHON OIL CO. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 70, 628 F. 2d 70.

No. 79–1401. OHIO COUNTY AND INDEPENDENT AGRICULTURE SOCIETIES, DELAWARE COUNTY FAIR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 610 F. 2d 448.

No. 79–1442. ASSOCIATED BUILDERS & CONTRACTORS, INC., BALTIMORE METROPOLITAN CHAPTER *v.* LUBBERS, GENERAL COUNSEL OF NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 1221.

No. 79–1445. SCHMIDT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79–1456. FRUEHAUF CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 434.

No. 79–1490. JACKSON ET VIR *v.* WHERRY ET AL. Ct. App. D. C. Certiorari denied.

No. 79–1528. SMITH ET AL. *v.* EQUITY NATIONAL INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 1007.

No. 79–1537. COWLEY, DBA COWLEY PUMP & SUPPLY, ET AL. *v.* BRADEN INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 751.

No. 79–1541. ROSS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 689, 618 F. 2d 122.

No. 79–1554. FERRELL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 274 S. C. 401, 266 S. E. 2d 869.

No. 79–1556. CANRON, INC. *v.* PLASSER AMERICAN CORP. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 1075.

No. 79–1559. BRAMBLETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 79–1566. IOWA STATE MEN'S REFORMATORY ET AL. *v.* GUNTHER. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1079.

No. 79–1568. DISTRICT OF COLUMBIA *v.* BISHOP ET AL. Ct. App. D. C. Certiorari denied. Reported below: 411 A. 2d 997.

No. 79–1590. NOLAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 747.

No. 79–1593. GULF OIL CORP. ET AL. *v.* PENNSYLVANIA POWER & LIGHT CO. Super. Ct. Pa. Certiorari denied. Reported below: 270 Pa. Super. 514, 411 A. 2d 1203.

No. 79–1619. MOSSER *v.* WHITE-WELD & CO., INC. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 587 S. W. 2d 485.

No. 79–1663. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 350.

No. 79–1684. MEDELLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 1297.

No. 79–5700. HUNT *v.* GRASSO, GOVERNOR OF CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1287.

No. 79–5795. WEST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 2d 274.

No. 79–5841. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 909.

No. 79–5983. HUNT *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1034, 392 N. E. 2d 793.

No. 79–6100. ASHCROFT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1167.

No. 79–6101. VASIL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 374 So. 2d 465.

No. 79–6106. PARROTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 572.

No. 79–6117. DASKALAKIS *v.* EXECUTIVE COMMERCIAL SERVICES, LTD., ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 74 Ill. App. 3d 760, 393 N. E. 2d 1365.

No. 79–6120. ZUROSKY ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 614 F. 2d 779.

No. 79–6141. FORD *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 73 Ill. App. 3d 1111, 395 N. E. 2d 1249.

No. 79–6145. LEE *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–6157. BUCKLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 361.

No. 79–6221. GINTER *v.* SOUTHERN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 611 F. 2d 1226.

No. 79–6243. O'BRIEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1361.

No. 79–6246. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 613 F. 2d 28.

No. 79–6253. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 615 F. 2d 1020.

No. 79–6269. DYAS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 265 Ark. xxii.

No. 79–6273. CHAPMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 615 F. 2d 1294.

No. 79–6277. BUCK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1362.

No. 79–6332. STEVENS *v.* NORTH CAROLINA. Super. Ct. N. C., Mecklenberg County. Certiorari denied.

No. 79–6333. BAINES *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–6338. STREET *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79–6342. LANE *v.* JEFFERSON HEALTH CARE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 573.

No. 79–6347. GIORDANO *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 8 Mass. App. 590, 395 N. E. 2d 896.

No. 79–6349. SCHULTZ *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–6351. GARRETT *v.* ARRINGTON, SHERIFF. Sup. Ct. Ga. Certiorari denied. Reported below: 245 Ga. 47, 262 S. E. 2d 808.

No. 79–6356. HOP-WAH, AKA GREEN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 613 F. 2d 312.

No. 79–6357. SHAW *v.* COLE, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–6358. ANGEL *v.* CLARK. C. A. 5th Cir. Certiorari denied.

No. 79–6360. TAYLOR *v.* HAYES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79–6363. DAWN *v.* WENZLER ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–6367. BROOKS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 620 F. 2d 308.

No. 79–6377. GRACEY *v.* MILLER. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1104, 399 N. E. 2d 1390.

No. 79–6436. RAY *v.* SOWDERS, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 582.

No. 79–6461. SULLIVAN *v.* FORD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 609 F. 2d 197.

No. 79–6468. KING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 2d 1034.

No. 79–6483. PAYTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 615 F. 2d 922.

No. 79–6486. VENABLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6495. MELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79–6498. SANDERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 614 F. 2d 292.

No. 79–6501. LABINIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1207.

No. 79–6503. FERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 616 F. 2d 590.

No. 79–6505. HAYWARD *v.* DAY. C. A. 8th Cir. Certiorari denied. Reported below: 619 F. 2d 716.

No. 79–1317. HUNT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 601 P. 2d 464.

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No. 79–6527. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 118.

No. 79–1553. COLEMAN *v.* MONTANA. Sup. Ct. Mont.; and

No. 79–5975. BOWEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–1553, — Mont. —, 605 P. 2d 1000; No. 79–5975, 244 Ga. 495, 260 S. E. 2d 855.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 79–1190. LASALLE NATIONAL BANK, TRUSTEE, ET AL. *v.* PEOPLES GAS LIGHT & COKE CO., 445 U. S. 943. Petition for rehearing denied.

No. 79–6018. STEELE *v.* BARRETT ET AL., 445 U. S. 933. Motion for leave to file petition for rehearing denied.

JUNE 2, 1980

Appeals Dismissed

No. 79–1295. MCKEESPORT AREA SCHOOL DISTRICT *v.* PENNSYLVANIA DEPARTMENT OF EDUCATION. Appeal from Pa. Commw. Ct. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 38 Pa. Commw. 290, 392 A. 2d 912.

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, concurring.

Under Pennsylvania law, a public school district must provide nonpublic school children with transportation to and

from school and transportation for educational field trips if those services are provided to public school children. Pa. Stat. Ann., Tit. 24, § 13–1361 (Purdon Supp. 1979–1980). The present controversy centers on that portion of the statute dealing with transportation to and from school. MR. JUSTICE BLACKMUN's concurring opinion, however, *post*, at 978, states that it "is not automatically apparent from the jurisdictional statement and the motion to dismiss that have been filed with this Court, or from the summary opinion of the [Pennsylvania] Commonwealth Court," that the constitutionality of the field-trip provision is not before us. I write both to demonstrate that the absence of the field-trip issue is absolutely clear and to analyze the law that MR. JUSTICE BLACKMUN would apply to this case if the field-trip issue were present.

I

In *School District of Pittsburgh* v. *Pennsylvania Dept. of Education*, 443 U. S. 901 (1979), we dismissed for want of a substantial federal question an appeal challenging the constitutionality of the same statute challenged here. The question presented by the jurisdictional statement in *School District of Pittsburgh* reads as follows: "Whether Pennsylvania Act 372 of 1972 [Act of Dec. 29, 1972, P. L. 1726, No. 372, amending § 1361 of the Public School Code of 1949 (24 P. S. § 13–1361, as amended)] requiring school districts to transport resident nonpublic school pupils to and from schools located up to 10 miles beyond district boundaries violates the Establishment Clause of the First Amendment of the Constitution of the United States because of the Act's primary effect of advancing religion in addition to fostering excess entanglement of the state with religion." Juris. Statement, O. T. 1978, No. 78–1614, p. 3. The question presented by the jurisdictional statement in the instant case is identically phrased. Juris. Statement 4. Because a ruling of dismissal for want of a substantial federal question is a judgment on the merits, *Hicks* v.

Miranda, 422 U. S. 332, 344 (1975), and because this case presents the same challenge to the same statute that we rejected in *School District of Pittsburgh*, the same outcome properly follows here.

II

Nor can it be maintained that, although the identical statute and constitutional arguments are involved in both cases, *School District of Pittsburgh* involved a different application of the statute and thus that a different legal response is occasioned here. The instant litigation commenced with a show-cause order emanating from the Pennsylvania Department of Education, an order that placed in jeopardy under the statute appellant school district's public transportation reimbursement for the 1973–1974 school year. The order was premised not on any district action regarding field trips, but on the district's alleged refusal to transport students to five specified nonpublic schools beyond district boundaries in violation of the statute. Juris. Statement 7–8. Similarly, in *School District of Pittsburgh*, the litigation commenced with a show-cause order from the Department of Education threatening the appellant district's public transportation reimbursement for the 1973–1974 school year and relying on the district's alleged refusal to transport students to 20 specified institutions located beyond district boundaries. Juris. Statement, O. T. 1978, No. 78–1614, pp. 7–8.

In short, both cases involve controversies surrounding transportation to nonpublic schools outside the relevant district in accordance with a statute that also happens to provide for educational field trips for nonpublic school children. Neither case, however, involves any claim that the field-trip provision, as distinguished from the provision for transportation to and from nonpublic schools, is a forbidden establishment of religion.[1] In neither case did the state courts address such an

[1] Even a cursory glance at the statutory language, see *post*, at 977, n. *, confirms that the two provisions are distinct and severable. School

issue, and in neither was the field-trip provision expressly included in or subsumed by the question presented in the jurisdictional statement. Indeed, the Pennsylvania Supreme Court in *School District of Pittsburgh*, upon which case the Pennsylvania Commonwealth Court in the instant suit relied, App. to Juris. Statement 4a, expressly declared that the field-trip "portion of Act 372 is not before us" and that the court "need not consider the constitutionality of the field trip provision." *Springfield School Dist.* v. *Department of Ed.*, 483 Pa. 539, 553, n. 6, 397 A. 2d 1154, 1161, n. 6 (1979). It is apparent, therefore, that we have no jurisdiction to decide the validity of the part of the statute dealing with field trips. *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Crowell* v. *Randell*, 10 Pet. 368, 391 (1836). See R. Stern & E. Gressman, Supreme Court Practice § 3.27, p. 214 (5th ed. 1978) ("It has long been established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below").

III

Affirming this case thus would involve no inconsistency with *Wolman* v. *Walter*, 433 U. S. 229 (1977), where this Court saw lurking behind a routine exercise in local pedagogy, the educational field trip, the menacing hulk of an established state religion. Since MR. JUSTICE BLACKMUN's concurrence adverts to *Wolman* as authority in this area, however, that case merits further examination.

In *Wolman* the Ohio Legislature had enacted a multifaceted program designed to provide assistance to nonpublic schools, presumably in recognition of the central importance of these schools in fulfilling the Nation's educational mission. See *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 813–820 (1973) (WHITE, J., dissenting). The program in-

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district action that implicates one provision need not, and does not here, implicate the other.

cluded, *inter alia*, the loaning of secular textbooks to nonpublic school students or their parents; the supplying to nonpublic schools of standardized tests and scoring services; and the granting to nonpublic schools of field trips and transportation services such as are provided to public school students. The Court found certain aspects of the program acceptable under the Establishment Clause—*e. g.*, secular textbooks, standardized tests and scoring—but other aspects, including the field-trip provision, did not fare so well.

The Court believed that the field-trip provision had several troubling features. First, "the nonpublic school controls the timing of the trips and, within a certain range, their frequency and destinations," indicating that "the schools, rather than the children, truly are the recipients of the service. . . ." 433 U. S., at 253. Second, the Court observed that, "although a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful," *ibid.*, and this poses "an unacceptable risk of fostering of religion [as] an inevitable byproduct." *Id.*, at 254. Finally, to ensure that nonpublic schools do not pursue sectarian ends on their field trips would entail supervision by public school authorities, which "would create excessive [governmental] entanglement" in the affairs of sectarian institutions. *Ibid.*

In the present case, as in *Wolman*, we are not faced with a legislative enactment evincing a sectarian purpose. *Id.*, at 236. Fortunately, all of us continue to regard the achievement of educational quality as a valid secular end that States may pursue. A secular legislative purpose, however, is only one of the Court's Establishment Clause indicia. To pass muster a statute must also have "a principle or primary effect that neither advances nor inhibits religion" and "must not foster an excessive government entanglement with religion." *Ibid.* See *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976); *Committee for Public Education* v. *Nyquist*,

supra, at 772–773; *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). In *Wolman*, the Court concluded that the challenged statute fails the latter two tests by subsidizing field trips for nonpublic school students.

What is the "principal or primary effect" of such a provision? The most reasonable appraisal surely suggests that the principal or primary effect of field trips for nonpublic school students is that boys and girls whose parents have exercised their constitutional right to send their children to private schools, *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), will expand their educational horizons, just as the public school children benefiting from the same experience will expand theirs. Is this a danger from which we must shield the American public? The Court in *Wolman* failed to explain why we should not consider the venerable institution of the field trip as firmly grounded in sound educational policy and the effect sought to be created by educators and legislators as pedagogical and not religious. In *Wolman*, the Court could do no more than voice insubstantial and baseless fears that field trips might be used for religious indoctrination.

And what of excessive entanglement? As I read the instant statute, the State of Pennsylvania has devised no mechanism for "policing" nonpublic schools. The Supreme Court of Pennsylvania has similarly concluded that the "Act before us does not in any manner require the state to engage in 'a comprehensive, discriminating and continuing' surveillance of the nonpublic school teachers." 483 Pa., at 566, 397 A. 2d, at 1168, quoting *Lemon* v. *Kurtzman*, *supra*, at 619. Nor had the State of Ohio in *Wolman* devised such a mechanism. Yet there the Court, without the benefit of any record facts showing actual entanglement, went on to conclude that, if the State of Ohio were ever to police nonpublic school field trips, excessive entanglement would result.

The precedential—or, for that matter, the persuasive—force of such *ex cathedra* wanderings is deservedly minimal. A decision that concedes a secular purpose, describes no actual

religious effect, and allows that there is no present excessive entanglement furnishes very little guidance for subsequent Establishment Clause inquiries. Insofar as field trips were concerned, *Wolman*, at bottom, was a decision predicated on fear of a series of unsubstantiated eventualities: What *if* the nonpublic school controls the timing, frequency, and destination of field trips so as to create a religious effect? 433 U. S., at 253. What *if* a nonpublic school teacher contrives, in making the field trip "meaningful," to exalt religion? *Ibid.* What *if* the State were ever to police nonpublic schools to make sure the field trips remained secular in character? *Id.*, at 254.

Responding to such fears is a difficult, if not impossible, task. One can say "it isn't so" on the indisputable ground that "it isn't." This would be one way of declining to find in the record what is not there. Perhaps the best response, however, is to observe that we ought "not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment," *Lemon* v. *Kurtzman*, *supra*, at 618, quoted in *Wolman* v. *Walter*, 433 U. S., at 254, and to remind the Court "that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions does not constitute 'law[s] respecting an establishment of religion' forbidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mission." *Lemon* v. *Kurtzman*, *supra*, at 663–664 (WHITE, J., concurring in part and dissenting in part).[2]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, concurring.

Section 1361 of the Pennsylvania Public School Code of 1949 (Pa. Stat. Ann., Tit. 24, § 13–1361 (Purdon 1962)), as

[2] In this respect it is useful to bear in mind MR. JUSTICE BLACKMUN'S

amended by 1972 Pa. Laws No. 372,* authorizes a public school district of the Commonwealth of Pennsylvania to provide free transportation for its kindergarten, elementary, and secondary school pupils, and also to provide free transportation to and from any point in the Commonwealth for educational field trips. The statute states, in addition, that when such transportation is provided for public school pupils, the district "shall also make identical provision" for pupils who attend nonprofit, nonpublic schools located within the district or outside the district at a distance not exceeding 10 miles.

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admonition in *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 747 (1976) (footnote omitted), quoted in *Committee for Public Education* v. *Regan*, 444 U. S. 646, 658, n. 6 (1980):

"The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way."

*"The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the kindergarten, elementary school, or secondary school in which he is lawfully enrolled, provided that such school is not operated for profit and is located within the district boundaries or outside the district boundaries at a distance not exceeding ten miles by the nearest public highway, . . . and to and from any points in the Commonwealth in order to provide field trips for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of public school pupils to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided, the board of school directors shall also make identical provision for the free transportation of pupils who regularly attend nonpublic kindergarten, elementary and high schools not operated for profit to and from such schools or to and from any points in the Commonwealth in order to provide field trips as herein provided." Pa. Stat. Ann., Tit. 24, § 13–1361 (Purdon Supp. 1979–1980).

Appellant district challenged the Pennsylvania statute as violative of the Fourteenth Amendment's Equal Protection Clause and of the First Amendment's Establishment Clause. The Commonwealth Court of Pennsylvania upheld the statute against that challenge. 38 Pa. Commw. 290, 392 A. 2d 912 (1978). The Supreme Court of Pennsylvania denied a petition for allowance of an appeal.

I join the Court's dismissal of this case only on the specific assumption that the issue of the constitutionality of the field-trip provision of the Pennsylvania statute is not before us. The absence of that issue, for me at least, is not automatically apparent from the jurisdictional statement and the motion to dismiss that have been filed with this Court, or from the summary opinion of the Commonwealth Court. That opinion, however, states: "No issue of law or fact distinguishes this case from earlier cases decided by this Court and upholding the Secretary's interpretation of the Act and the Act's constitutionality as so interpreted." 38 Pa. Commw., at 291, 392 A. 2d, at 912. That court's "earlier cases" cited are *School Dist. of Pittsburgh* v. *Commonwealth Dept. of Ed.*, 33 Pa. Commw. 535, 382 A. 2d 772 (1978); *Springfield School Dist.* v. *Commonwealth Dept. of Ed.*, 35 Pa. Commw. 71, 384 A. 2d 1049 (1978); and *Pequea Valley School Dist.* v. *Commonwealth Dept. of Ed.*, 36 Pa. Commw. 403, 387 A. 2d 1022 (1978).

On appeal to the Supreme Court of Pennsylvania, those three decisions of the Commonwealth Court were affirmed by a divided vote in a single opinion. *Springfield School Dist.* v. *Department of Ed.*, 483 Pa. 539, 397 A. 2d 1154 (1979). In its opinion, the Supreme Court of Pennsylvania construed the basic free-transportation provision of the Pennsylvania statute in such a way as to alleviate federal constitutional concern. It specifically noted, however, that the field-trip provision of the Act "is not before us in these appeals," and that

the constitutionality of the field-trip provision need not be considered. *Id.*, at 553, n. 6, 397 A. 2d, at 1161, n. 6. The court went on to observe, *ibid.*, that the Attorney General of Pennsylvania has ruled the field-trip provision of the Act unconstitutional in its application to sectarian nonpublic schools. 1977 Op. Atty. Gen. No. 15.

In the present case I therefore assume that when the Commonwealth Court observed that no issue of law or fact distinguished this case from its cited "earlier cases," it necessarily means that the constitutionality of the field-trip provision was not at issue. It is only on that assumption that I join the Court in its dismissal of the appeal, for in *Wolman* v. *Walter*, 433 U. S. 229, 252–255 (1977), the Court flatly ruled that field-trip reimbursements to parochial schools are violative of the First Amendment. The continuing vitality of *Wolman* as controlling precedent in this area was recognized in *Committee for Public Education* v. *Regan*, 444 U. S. 646, 654 (1980).

No. 79–1563. YAKIMA COUNTY DEPUTY SHERIFF'S ASSN. *v.* BOARD OF COMMISSIONERS FOR YAKIMA COUNTY, WASHINGTON, ET AL. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Reported below: 92 Wash. 2d 831, 601 P. 2d 936.

No. 79–1608. TAYLOR ET AL. *v.* WISCONSIN TAX APPEALS COMMISSION ET AL. Appeal from Sup. Ct. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 92 Wis. 2d 915, 289 N. W. 2d 306.

No. 79–6393. DOE *v.* SEARS. Appeal from Sup. Ct. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 245 Ga. 83, 263 S. E. 2d 119.

No. 79–6219. NELSON *v.* STATE ACCIDENT INSURANCE FUND. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 43 Ore. App. 155, 602 P. 2d 341.

Certiorari Granted—Reversed. (See Nos. 79–912 and 79–914, *ante*, p. 754.)

Certiorari Granted—Vacated and Remanded

No. 79–6290. DUPRIS *v.* UNITED STATES. C. A. 8th Cir. Motion of Cheyenne River Sioux Tribe of Cheyenne River Reservation for leave to file a brief as *amicus curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the United States District Court for the District of South Dakota (Central Division) to consider the question of mootness. Reported below: 612 F. 2d 319.

Miscellaneous Orders

No. A–946. BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* CALDWELL ET AL. Application to stay injunction of the United States District Court for the Northern District of New York, entered December 3, 1979, addressed to MR. JUSTICE STEVENS and referred to the Court, denied.

No. 79–1457. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, LOCAL 1969, ET AL. *v.* BISE ET AL. C. A. 9th Cir.; and

No. 79–1617. DEPARTMENT OF TRANSPORTATION OF OKLAHOMA *v.* PILE. Sup. Ct. Okla. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–1266. STEADMAN *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 5th Cir. [Certiorari granted, *ante*, p. 917.] Motion of petitioner to dispense with printing appendix granted.

No. A–995 (79–1791). FLYNT *v.* GEORGIA. Application for stay of execution and enforcement of mandate of the Court of Appeals of Georgia, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the application.

No. A–990 (79–1839). FAZIO ET AL. *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Fifth Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. 79–6390. MATTHEWS *v.* UNITED STATES;

No. 79–6412. MUINA *v.* DEPARTMENT OF PROFESSIONAL LICENSING OF MONTANA ET AL.; and

No. 79–6446. JONES *v.* PORTER, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Certiorari Denied. (See also Nos. 79–912 and 79–914, *ante*, p. 754; and Nos. 79–1608, 79–6393, and 79–6219, *supra*.)

No. 79–1136. BROWN & ROOT, INC., ET AL. *v.* JOYNER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1087.

No. 79–1280. FIRST INVESTMENT ANNUITY COMPANY OF AMERICA *v.* MILLER, SECRETARY OF THE TREASURY, ET AL.; and

No. 79–1281. INVESTMENT ANNUITY, INC. *v.* MILLER, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 235, 609 F. 2d 1.

No. 79–1315. DOYLE ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 285, 599 F. 2d 984, and 220 Ct. Cl. 326, 609 F. 2d 990.

No. 79–1199. TEXAS *v.* BATTARBEE. 183d Jud. Dist. Ct. Tex., Harris County. Certiorari denied.

No. 79–1343. DIGGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 255, 613 F. 2d 988.

No. 79–1351. BABIC *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 777.

No. 79–1354. CLUB RECREATION & PLEASURE ET AL. *v.* OREGON EX REL. HAAS, DISTRICT ATTORNEY FOR MULTNOMAH COUNTY. Ct. App. Ore. Certiorari denied. Reported below: 41 Ore. App. 557, 599 P. 2d 1194.

No. 79–1361. BEATTIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 762.

No. 79–1425. WILDERNESS PUBLIC RIGHTS FUND *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL.; and

No. 79–1447. EISEMAN ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1250.

No. 79–1432. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* HECTOR MARTINEZ & CO. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 106.

No. 79–1444. ZANGRILLO *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 790, 416 N. Y. S. 2d 159.

No. 79–1455. KULIK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–1458. MORGAN GUARANTY TRUST COMPANY OF NEW YORK *v.* RINIER, AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, ET AL.; and

No. 79–1459. RODMAN, TRUSTEE IN BANKRUPTCY *v.* RINIER, AGENT FOR CERTAIN EMPLOYEES OF BANKRUPT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 319.

No. 79–1485. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* DUNBAR ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 100 Idaho 523, 602 P. 2d 21.

No. 79–1493. PELLON ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 620 F. 2d 286.

No. 79–1558. THEODOSOPOULOS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 119 N. H. 573, 409 A. 2d 1134.

No. 79–1562. BALDWIN ET AL. *v.* MILLS ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 377 So. 2d 971.

No. 79–1572. REVERE COPPER & BRASS INC. *v.* OVERSEAS PRIVATE INVESTMENT CORP. C. A. D. C. Cir. Certiorari denied. Reported below: 202 U. S. App. D. C. 81, 628 F. 2d 81.

No. 79–1584. VANGO *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–1600. BOMBARDIER LTD. ET AL. *v.* ENGINE SPECIALTIES, INC. C. A. 1st Cir. Certiorari denied. Reported below: 605 F. 2d 1.

No. 79–1604. HALL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 377 So. 2d 1123.

No. 79–1607. SHERARD *v.* SHELTON, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF WAYNE COUNTY. Sup. Ct. Mich. Certiorari denied. Reported below: 407 Mich. 888.

No. 79–1620. LOMBARD, SHERIFF, ET AL. *v.* COOPER ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 49 N. Y. 2d 69, 399 N. E. 2d 1188.

No. 79–1627. GREEN *v.* COUNTY OF ALAMEDA ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–1692. FAMOLARE, INC. *v.* EDISON BROTHERS STORES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–1699. HAWAIIAN TELEPHONE CO. ET AL. *v.* DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS OF HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 614 F. 2d 1197.

No. 79–1715. PARRISH ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–1745. SCAFIDI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 113.

No. 79–1758. ERICKSON ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–1773. ERICKSON ET UX. *v.* EUBANKS, U. S. DISTRICT JUDGE. C. A. 10th Cir. Certiorari denied.

No. 79–6035. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 349.

No. 79–6134. CHRISTIAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 592 S. W. 2d 625.

No. 79–6165. LUMSDEN *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 589 S. W. 2d 226.

No. 79–6172. SHARP *v.* RHODES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 615 F. 2d 1362.

No. 79–6179. CHAVEZ *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 604 P. 2d 1341.

No. 79–6189. McCoy *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 79–6196. Geromette *v.* General Motors Corp. C. A. 6th Cir. Certiorari denied. Reported below: 609 F. 2d 1200.

No. 79–6200. Thomas *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 411 A. 2d 618.

No. 79–6213. Beal *v.* Estelle, Corrections Director. C. A. 5th Cir. Certiorari denied.

No. 79–6226. Campbell *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 75 Ill. App. 3d 1101, 399 N. E. 2d 1388.

No. 79–6255. Quinones *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79–6283. Markt *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79–6297. Wade *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–6304. Taylor *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 615 F. 2d 1354.

No. 79–6314. Irvin *v.* Nanni et al. Ct. App. Tenn. Certiorari denied.

No. 79–6339. Harbolt *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 79–6346. Honeycutt *v.* Ward, Corrections Commissioner. C. A. 2d Cir. Certiorari denied. Reported below: 612 F. 2d 36.

No. 79–6381. Short *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 23 Wash. App. 1055.

No. 79–6382. SCOTT, ADMINISTRATRIX *v.* LANE. Sup. Ct. Va. Certiorari denied. Reported below: 220 Va. 578, 260 S. E. 2d 238.

No. 79–6401. RICE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–6402. SHIRD *v.* WARDEN, MARYLAND CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 104.

No. 79–6405. DAVIS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 72 App. Div. 2d 669, 422 N. Y. S. 2d 271.

No. 79–6408. NUNN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–6409. STEVENS *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 105.

No. 79–6414. HARRIS *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1307.

No. 79–6416. DOE *v.* ANKER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1286.

No. 79–6420. HENDERSON *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 613 F. 2d 175.

No. 79–6464. BRISSETTE *v.* MACCHIAROLA, CHANCELLOR, NEW YORK CITY BOARD OF EDUCATION. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–6480. BULLOCK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 112.

No. 79–6492. MORGAN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 299 N. C. 191, 261 S. E. 2d 827.

No. 79–6497. GOODWIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 612 F. 2d 1103.

No. 79–6508. FLANAGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–6518. MOORE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 616 F. 2d 1030.

No. 79–6523. PEDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 612 F. 2d 584.

No. 79–6528. GAUSE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 620 F. 2d 295.

No. 79–6538. NUNN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 111.

No. 79–6539. ROMAN *v.* LE FEVRE, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–6547. HOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 618 F. 2d 1319.

No. 79–6567. KEARNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 620 F. 2d 305.

No. 79–6572. DUKAJGINI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 628 F. 2d 1346.

No. 79–1225. FIDELITY UNION LIFE INSURANCE CO *v.* PERRY. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 606 F. 2d 468.

No. 79–1348. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST); and HELGE ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Motions for leave to file briefs as *amici curiae* filed by the following were granted: National Council of Churches of Christ et al., American Civil Liberties Union of

Southern California et al., Holy Spirit Association for the Unification of World Christianity et al., Church of the Nazarene, and Catholic League for Religious and Civil Rights. Certiorari denied.

No. 79–6588. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 618 F. 2d 106.

No. 79–1290. COMMUNITY LOAN CORPORATION OF RICHMOND COUNTY ET AL. *v.* CODY ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 606 F. 2d 499.

No. 79–1438. OTEY *v.* NEBRASKA. Sup. Ct. Neb.;
No. 79–5921. BLAKE *v.* GEORGIA. Sup. Ct. Ga.;
No. 79–6194. O'BRYAN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 79–6250. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss.; and
No. 79–6422. BURGER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: No. 79–1438, 205 Neb. 90, 287 N. W. 2d 36; No. 79–5921, 244 Ga. 466, 260 S. E. 2d 876; No. 79–6194, 591 S. W. 2d 464; No. 79–6250, 375 So. 2d 994; No. 79–6422, 245 Ga. 458, 265 S. E. 2d 796.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79–1581. COCA-COLA BOTTLING COMPANY OF ARKANSAS *v.* CHAUFFEURS, TEAMSTERS & HELPERS LOCAL UNION NO. 878. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 613 F. 2d 716.

No. 79–1621. REYNOLDS METALS CO. *v.* ALUMINUM COMPANY OF AMERICA ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 609 F. 2d 1218.

No. 79–6121. HYMAN *v.* RICKMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1104.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Petitioner, an inmate at the Stateville Correctional Center in Joliet, Ill., filed *pro se* a civil rights action pursuant to 42 U. S. C. § 1983, alleging that the defendants he named (the warden and three officers of the prison guard) had deprived him of his constitutional rights by failing to afford him appropriate medical treatment for glaucoma, a sight-threatening eye condition. According to appointed counsel's statement of the case, petitioner's condition, while made known to the prison authorities at the beginning of his incarceration, did not receive the attention of an eye doctor during his first four months at Stateville, and he was denied the medication that eventually was prescribed for him until he was hospitalized some eight months after entering the prison. Pet. for Cert. 2. After being released from the hospital, petitioner continually had to prod the guards to give him his medicine, and they sometimes denied it to him. His eyes were permanently injured. *Ibid.*

The United States District Court for the Northern District of Illinois initially granted the defendants' motion for summary judgment on all of petitioner's claims. Although granting leave to proceed *in forma pauperis*, that court failed to act upon petitioner's motion, under 28 U. S. C. § 1915 (d), for the appointment of counsel.[1] The United States Court of Appeals for the Seventh Circuit, after appointing counsel

[1] Title 28 U. S. C. § 1915 (d) provides that in *in forma pauperis* cases "[t]he court may request an attorney to represent any such person unable to employ counsel. . . ."

to represent petitioner on appeal, reversed the District Court's judgment in part, remanding the case for further proceedings on petitioner's claim that respondents intentionally had deprived him of medication.

On remand, petitioner again moved the District Court for the appointment of counsel, and, unlike the Court of Appeals, the District Court denied his motion. Petitioner presented his own case in a 4-day jury trial. At the conclusion of his presentation of evidence, the District Court granted directed verdicts in favor of the warden and two of the guards, who evidently had little responsibility for petitioner's treatment on a day-to-day basis. Petitioner based his case against the fourth defendant, Lt. James L. Rickman, on allegations that this officer had sometimes denied petitioner medication on weekends. The case was submitted to the jury but they were unable to reach a verdict. Following a second trial, during which petitioner again represented himself, the jury found for Rickman.

Petitioner appealed a second time, and the Court of Appeals again appointed counsel to represent him. Petitioner argued that the District Court's failure to appoint counsel to represent him at trial had been an abuse of discretion and reversible error because his claim in fact was colorable (as evidenced by the Court of Appeals' earlier reversal of the District Court's entry of summary judgment), because the trial issues were factually and legally complex, because the constitutional right at stake was serious, and because the presence of counsel would have substantially aided petitioner in presenting his case. The Court of Appeals rejected this argument, holding, in an unpublished opinion, that the decision to appoint counsel for a civil rights litigant proceeding *in forma pauperis* rests with the discretion of the trial court. It repeated the standard it had articulated in earlier cases, that "[o]nly when a 'denial [of counsel] would result in fundamental unfairness impinging on due process rights' . . . will an appeals court overturn a decision of the district court

not to appoint counsel." App. to Pet. for Cert. 3 (quoting *Heidelberg* v. *Hammer*, 577 F. 2d 429, 431 (CA7 1978)).[2]

The Court of Appeals found no abuse of discretion in this case because the record revealed that petitioner understood the issue that was remanded for trial and had introduced evidence on that issue. Even conceding that counsel may have amended petitioner's complaint after the first appeal to expand his claim concerning the denial of medical treatment, the court concluded that petitioner had received a fair opportunity to state his case.

Petitioner contends that if his motion for the appointment of counsel had been granted by the District Court, counsel no doubt would have amended petitioner's complaint to add as defendants the prison physicians who were most responsible for his inadequate medical treatment. Counsel, unlike petitioner, would not have focused the jury's attention on isolated instances in which a single guard failed to give petitioner his medication, but rather would have concentrated on the lengthy period during which petitioner received no treatment at all for his sight-threatening condition. Appointed counsel would have obtained expert testimony to testify that glaucoma, if not treated properly, progressively leads to total blindness and irreversible damage.

I believe that under the controlling standards governing the appointment of counsel in civil rights cases that have been

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[2] The standard of review articulated by the court in this case is derived from its earlier decision in *LaClair* v. *United States*, 374 F. 2d 486, 489 (CA7 1967). In *Chapman* v. *Kleindienst*, 507 F. 2d 1246, 1250, n. 6 (CA7 1974), the court refrained from deciding whether *LaClair*'s standard should be replaced by that articulated in *Dreyer* v. *Jalet*, 349 F. Supp. 452, 486 (SD Tex. 1972), affirmance order, 479 F. 2d 1044 (CA5 1973): "[I]f a civil action brought by an indigent acting pro se, including prison inmates, has merit requiring an evidentiary hearing, then counsel should be appointed to properly present the claim." In *Heidelberg* v. *Hammer*, 577 F. 2d, at 431, the court stated: "We are not now disposed to overrule the holding of *LaClair*. . . ."

adopted by other Courts of Appeals, a district court would have granted petitioner's § 1915 (d) motion. See *Gordon* v. *Leeke*, 574 F. 2d 1147, 1153 (CA4), cert. denied, 439 U. S. 970 (1978) ("If it is apparent to the district court that a *pro se* litigant has a colorable claim but lacks the capacity to present it, the district court should appoint counsel to assist him"); *Shields* v. *Jackson*, 570 F. 2d 284, 286 (CA8 1978) (where an indigent prisoner is in no position to investigate his case, his complaint states a cause of action, and the appointment of counsel will advance the administration of justice, the case will be remanded with directions to the district court to appoint counsel). See also *Chubbs* v. *City of New York*, 324 F. Supp. 1183, 1191 (EDNY 1971) ("If the case has merit and a trial is required counsel should be appointed. The prisoner himself can simply not prepare and try the case effectively"); and n. 2, *supra*.

Questions concerning the standards by which district courts are to exercise their discretion in appointing counsel under § 1915 (d), and the degree to which the exercise of that discretion is to be controlled, are of obvious importance to the administration of justice, and to the enforcement of federal civil rights, particularly in our Nation's penal institutions. Because I believe that petitioner's motion for the appointment of trial counsel would have been granted in other circuits, and that he may well have been prejudiced in presenting his case by the failure of the District Court to appoint counsel, I would grant certiorari and set the case for argument.

No. 79–6359. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 611 F. 2d 531.

Rehearing Denied

No. 78–1756. UNITED STATES *v.* MITCHELL ET AL., 445 U. S. 535. Petition for rehearing denied.

No. 78–1779. OWEN *v.* CITY OF INDEPENDENCE, MISSOURI, ET AL., 445 U. S. 622;

No. 79–1265. CATERINA *v.* PENNSYLVANIA, 445 U. S. 963;

No. 79–1285. MASCHHOFF *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., 445 U. S. 964;

No. 79–5993. FAIRRIS *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p 920;

No. 79–6040. BEEDE *v.* NEW HAMPSHIRE, 445 U. S. 967; and

No. 79–6043. KIBERT *v.* BLANKENSHIP, CORRECTIONAL SUPERINTENDENT, *ante*, p. 911. Petitions for rehearing denied.

JUNE 4, 1980

Dismissal Under Rule 60

No. 79–1805. MARYLAND *v.* WHITFIELD. Ct. App. Md. Certiorari dismissed under this Court's Rule 60. Reported below: 287 Md. 124, 411 A. 2d 415.

JUNE 5, 1980

Dismissal Under Rule 60

No. 79–1803. GRASSI ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari dismissed as to petitioner Grassi under this Court's Rule 60. Reported below: 378 So. 2d 934.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 29, 1980, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 996. The Judicial Conference Reports referred to in that letter are not reproduced herein.

Note that under 28 U. S. C. § 2072, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter. Moreover, Congress may defer the effective date to a later date or until approved by Act of Congress, or may modify such amendments.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, and 419 U. S. 1133.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1980

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Civil Procedure prescribed pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules is an excerpt from the Reports of the Judicial Conference of the United States containing the Advisory Committee notes which were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Respectfully,

(Signed) WARREN E. BURGER,
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

TUESDAY, APRIL 29, 1980

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Rules 4, 5, 26, 28, 30, 32, 33, 34, 37 and 45 as hereinafter set forth:

[See *infra*, pp. 1003–1011.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That subsection (e) of Rule 37 of the Federal Rules of Civil Procedure is hereby abrogated, effective August 1, 1980.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 26, 33, 34, and 37—the cluster of Rules authorizing and regulating discovery generally, interrogatories, production of documents, and sanctions for failure to make discovery. These amendments are not inherently objectionable. Indeed, they represent the culmination of several years' work by the Judicial Conference's distinguished and conscientious Standing Committee on Rules of Practice and Procedure and Advisory Committee on Civil Rules.[1] But the changes embodied in the amendments fall

[1] This Court's role in the rulemaking process is largely formalistic. Standing and advisory committees of the Judicial Conference make the

short of those needed to accomplish reforms in civil litigation that are long overdue.

The American Bar Association proposed significant and substantial reforms.[2] Although the Standing Committee initially favored most of these proposals, it ultimately rejected them in large part. The ABA now accedes to the Standing Committee's amendments because they make some improvements, but the most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled.[3] There are wide differences of opinion within the profession as to the need for reform. The bench and the bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. But whatever considerations may have prompted the Committee's final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.

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initial studies, invite comments on their drafts, and prepare the Rules. Both the Judicial Conference and this Court necessarily rely upon the careful work of these committees. Congress should bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves. See generally 409 U. S. 1132, 1133 (1972) (Douglas, J., dissenting from adoption of Federal Rules of Evidence); 383 U. S. 1032 (1966) (Black, J., dissenting from adoption of amendment to civil rules); 374 U. S. 865, 869–870 (1963) (statement of Black and Douglas, JJ., upon adoption of amendments to Federal Rules of Civil Procedure).

[2] American Bar Association, Report of the Section of Litigation Special Committee for the Study of Discovery Abuse (App. Draft 1977).

[3] ABA Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 (1980).

When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice." *Herbert* v. *Lando*, 441 U. S. 153, 179 (1979) (POWELL, J., concurring). Properly limited and controlled discovery is necessary in most civil litigation. The present Rules, however, invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds.[4] Even in a relatively simple case, discovery through depositions, interrogatories, and demands for documents may take weeks. In complex litigation, discovery can continue for years. One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution of disputes. If there is disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies.

Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules.[5] Indeed,

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[4] MR. JUSTICE WHITE, writing for the Court, recently reminded the federal courts that "the discovery provisions . . . are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy*, and *inexpensive* determination of every action.'" *Herbert* v. *Lando*, 441 U. S. 153, 177 (1979).

In his most recent Annual Report on the State of the Judiciary, THE CHIEF JUSTICE declared that "[t]he responsibility for control [of pretrial processes] rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act." Address to American Bar Association Mid-Year Meeting 6 (Feb. 3, 1980).

[5] Writing from his wide experience as a judge, practicing lawyer, and Attorney General, Griffin B. Bell advised the Standing Committee that "the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity and high cost of civil

the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, led by THE CHIEF JUSTICE,[6] identified "abuse in the use of discovery [as] a major concern" within our legal system.[7] Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate.[8] Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue

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litigation in the federal courts." Letter to The Honorable Roszel C. Thomsen, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference 1 (June 27, 1978).

[6] THE CHIEF JUSTICE's keynote address to this distinguished assembly, popularly known as the Pound Conference, recognized that discovery processes "are being misused and overused." See Burger, Agenda for 2000 A. D.—A Need for Systematic Anticipation, 70 F. R. D. 83, 95 (1976).

[7] See Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-first Century, 76 F. R. D. 277, 288 (1978); ABA, Report of Pound Conference Follow-up Task Force, 74 F. R. D. 159, 171, 191–192 (1976).

[8] "The principal function of procedural rules," as Mr. Justice Black observed in another context, "should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." 346 U. S. 946 (1954) (separate statement upon adoption of revised Supreme Court Rules).

to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.

The amendments to Rules 26, 33, 34, and 37 recommended by the Judicial Conference should be rejected, and the Conference should be directed to initiate a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 4. Process.

(*a*) *Summons: Issuance.*—Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to any other person authorized by Rule 4 (c) to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

. . . . .

(*c*) *By whom served.*—Service of process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be made freely. Service of process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made.

. . . . .

Rule 5. Service and filing of pleadings and other papers.

. . . . .

(*d*) *Filing.*—All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

. . . . .

Rule 26. General provisions governing discovery.

. . . . .

(*f*) *Discovery conference.*—At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

Rule 28. Persons before whom depositions may be taken.

(*a*) *Within the United States.*—Within the United States or within a territory or insular possession subject to the juris-

diction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. The term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29.

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Rule 30. Depositions upon oral examination.

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(b) *Notice of examination: General requirements; special notice; non-stenographic recording; production of documents and things; deposition of organization; deposition by telephone.*

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(4) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

. . . . .

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28 (a), 37 (a)(1), 37 (b)(1) and 45 (d), a deposition taken by telephone is

taken in the district and at the place where the deponent is to answer questions propounded to him.

. . . . .

(f) Certification and filing by officer; exhibits; copies; notice of filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, he shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

. . . . .

Rule 32. Use of depositions in court proceedings.

(a) Use of depositions.—At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or

represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence.

. . . . .

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and when an action has been brought in any court of the United States or of any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.

. . . . .

Rule 33. Interrogatories to parties.

. . . . .

(c) *Option to produce business records.*—Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from

which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

. . . . .

(*b*) *Procedure.*—The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37 (a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or

shall organize and label them to correspond with the categories in the request.

. . . . .

Rule 37. Failure to make or cooperate in discovery: Sanctions.

. . . . .

(b) *Failure to comply with order.*

. . . . .

(2) *Sanctions by court in which action is pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30 (b)(6) or 31 (a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26 (f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35 (a) requiring him to produce another for

examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . . .

[(*e*) *Subpoena of person in foreign country.*]
(Abrogated April 29, 1980, effective August 1, 1980.)

. . . . .

(*g*) *Failure to participate in the framing of a discovery plan.*—If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26 (f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45. Subpoena.

. . . . .

(*d*) *Subpoena for taking depositions; place of examination.*

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (b) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk of the district court for the district in which the deposition is to be taken a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated

books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of Rule 26 (c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

. . . . .

(e) *Subpoena for a hearing or trial.*

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1011 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HANRAHAN ET AL. *v.* HAMPTON ET AL.

ON MOTION TO RECUSE

No. 79-912. Decided April 30, 1980*

Motion to recuse MR. JUSTICE REHNQUIST is denied.

MR. JUSTICE REHNQUIST.

Plaintiffs-respondents and their counsel in these cases have moved that I "be recused from the proceedings in this case" for the reasons stated in their 14-page motion and their five Appendices filed with the Clerk of this Court on April 3, 1980. The motion is opposed by the state-defendant petitioners in the action. Since generally the Court as an institution leaves such motions, even though they be addressed to it, to the decision of the individual Justices to whom they refer, see *Jewell Ridge Coal Corp.* v. *Mine Workers*, 325 U. S. 897 (1945) (denial of petition for rehearing) (Jackson, J., concurring), I shall treat the motion as addressed to me individually. I have considered the motion, the Appendices, the response of the state defendants, 28 U. S. C. § 455 (1976 ed. and Supp. III), and the current American Bar Association Code of Judicial Conduct, and the motion is accordingly

Denied.

*Together with No. 79-914, *Johnson et al.* v. *Hampton et al.*

SUMNER, WARDEN *v.* MATA

ON APPLICATION FOR STAY

No. A–882 (79–1601). Decided May 1, 1980

An application for a stay, pending consideration of a petition for certiorari, of the Court of Appeals' mandate under which a writ of habeas corpus would issue unless California granted respondent a new trial on a murder charge, is granted. In holding that certain witnesses' in-court identifications of respondent at his state trial were tainted by pretrial identifications resulting from impermissibly suggestive photographic arrays, the Court of Appeals reasoned that photographic identification, as opposed to less suggestive procedures, was not necessary under the circumstances, and that there was a very substantial likelihood of misidentification due to the procedures employed. Given the tension between the Court of Appeals' analysis and this Court's decisions indicating that reliability, not necessity, is the linchpin in determining the admissibility of identification testimony, and given the apparent conflict between the Court of Appeals' decision and a decision of another Court of Appeals, it appears that four Members of this Court are likely to vote to grant certiorari in this case.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant seeks to stay the mandate of the United States Court of Appeals for the Ninth Circuit under which a writ of habeas corpus would issue unless the State of California grants respondent Robert Mata a new trial on the charge of murder. See *Mata* v. *Sumner*, 611 F. 2d 754 (1979). On April 15, 1980, I temporarily stayed that mandate pending consideration of a response to the application and further order, in order to see whether there was a conflict among the Courts of Appeals or a substantial doctrinal difference from cases decided by this Court that would distinguish this decision from the numerous mine-run decisions on the reliability of identification that could not possibly be individually reviewed by this Court.

In 1972 respondent, then a prisoner at a medium-security

prison in Tehachapi, Cal., was charged with the murder of another prisoner, Leonard Arias. While investigating the murder, prison officials showed two prisoners who had witnessed the killing a series of photographic arrays containing pictures of respondent and his two alleged accomplices. Without recounting the details of each display, see *id.*, at 755–757, it suffices to say that the two witnesses eventually selected respondent's photograph from the arrays and subsequently identified him at trial as one of the persons involved in the killing.

On direct appeal from his conviction, respondent challenged the pretrial identification procedures and claimed they tainted the subsequent in-court identifications. The California Court of Appeal rejected this challenge, finding that there had been "no showing of influence by the investigating officers; that the witnesses had an adequate opportunity to view the crime; and that their descriptions [were] accurate." App. to Pet. for Cert. C–4—C–5. The California courts also rejected respondent's petition for a writ of habeas corpus, which petition similarly challenged the identification procedures employed by prison officials.

On respondent's subsequent petition for a federal writ of habeas corpus, the District Court concluded that, although "irregularities occurred in the pre-trial photographic identification" of respondent, those irregularities "did not so taint the in-court identifications . . . as to establish a constitutional violation. . . ." *Id.*, at D–3.

A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. In evaluating the admissibility of the in-court identifications, the majority of the Court of Appeals employed a "two-part approach." First, it considered whether photographic identification, as opposed to a lineup, was necessary under the circumstances. It answered this inquiry in the negative. Second, the majority inquired "whether there was a very substantial likelihood of irreparable

misidentification" due to the less-than-ideal procedures employed. It answered this inquiry in the affirmative. In summarizing this latter holding, the court clearly indicated that it considered the feasibility of a lineup a significant factor in its determination:

> "Based upon the lack of necessity [for a photographic array], the diversion of the witnesses' attention at the time the crime was committed, the hazy and very general description of the appellant [by one of the witnesses], and the inescapable focusing of attention upon the [respondent] by the investigating authorities, we are driven to the conclusion that the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F. 2d, at 759.

In his petition for a writ of certiorari, applicant contends that the majority of the Court of Appeals gave undue weight to the failure of the prison officials to employ a lineup as opposed to a photographic array in the present case. To the extent that the Court of Appeals did overturn respondent's conviction because it believed that "less suggestive" procedures were available, I believe that its decision ignores this Court's indication in *Manson* v. *Braithwaite*, 432 U. S. 98, 114 (1977), holding that reliability, not necessity, is the "linchpin in determining the admissibility of identification testmony . . . ," a conclusion in turn derived from our decision in *Neil* v. *Biggers*, 409 U. S. 188, 199–200 (1972). The decision of the majority of the Court of Appeals in this regard would also seem to conflict with *United States* v. *Gidley*, 527 F. 2d 1345 (CA5), cert. denied, 429 U. S. 841 (1976), where the United States Court of Appeals for the Fifth Circuit stated that the availability of less suggestive methods of identification is "not relevant" in determining whether a photographic display is impermissibly suggestive. 527 F. 2d, at 1350.

Two arguments offered by respondent merit brief mention. First, respondent asserts that the Court of Appeals' "two-part approach" incorporates the necessity of a challenged procedure only in determining whether that procedure, although suggestive, was nevertheless constitutionally permissible given the exigencies of the situation. A close reading of the appellate court's opinion, however, belies that interpretation, and demonstrates instead that the court considered the availability of less suggestive procedures an "important factor" in determining the reliability of the procedures actually employed. See 611 F. 2d, at 757, 759. Second, respondent suggests that this Court has declined on several prior occasions to review the two-part approach employed in the Ninth Circuit. See *United States* v. *Crawford*, 576 F. 2d 794 (CA9), cert. denied, 439 U. S. 851 (1978); *United States* v. *Pheaster*, 544 F. 2d 353 (CA9 1976), cert. denied, 429 U. S. 1099 (1977); *United States* v. *Calhoun*, 542 F. 2d 1094 (CA9 1976), cert. denied *sub nom. Stephenson* v. *United States*, 429 U. S. 1064 (1977); *United States* v. *Valdivia*, 492 F. 2d 199 (CA9 1973), cert. denied, 416 U. S. 940 (1974). In addition to the hazards of reading any meaning into this Court's denials of certiorari, I would also note that each of the aforecited cases came to this Court after the Court of Appeals had upheld the identification procedures there employed. We thus were not presented with opportunities to consider the relevance of the feasibility of less suggestive procedures to a determination that the procedure actually employed was unconstitutionally suggestive.

In this case the Court of Appeals rejected the uniform conclusion of several state courts and another federal court that the identification procedures employed here were not so suggestive as to taint the witnesses' in-court identification of respondent. Given the tension between the analysis employed by the majority of the Court of Appeals for the Ninth Circuit in this case and our decisions in *Manson*, *supra*, and

Neil, supra, and given the apparent conflict between the decision of the Court of Appeals for the Ninth Circuit in this case and the decision of the Court of Appeals for the Fifth Circuit in *Gidley, supra,* I have decided to grant applicant's request for an order staying the mandate in *Mata* v. *Sumner* (the present case), 611 F. 2d 754 (CA9 1979), cert. pending, No. 79–1601, because I am of the opinion that four Members of this Court are likely to vote to grant certiorari in that case when presented. As nearly as I can determine, that case should be considered by the Court on certiorari in the near future, and the stay which I am presently issuing shall expire without further action of the Court in the event that certiorari is denied. If certiorari is granted, the stay shall remain in effect until final disposition of the case or further order of the Court.

Accordingly, the application for the stay of mandate of the United States Court of Appeals in this case is

Granted.

PACILEO, SHERIFF *v.* WALKER

ON APPLICATION FOR STAY

No. A-894. Decided May 1, 1980

An application for a stay, pending consideration of a petition for certiorari, of a California Supreme Court order in connection with the extradition to Arkansas of respondent, who had escaped from an Arkansas prison, is granted. The order, *inter alia*, directed the California Superior Court to conduct hearings to determine if the Arkansas prison was presently operated in conformance with the Eighth Amendment and stayed execution of the Governor of California's warrant of extradition pending final determination of the proceeding. A stay of the order is warranted since the Governor of California had granted the request for extradition, which was in compliance with federal standards; the proper forum for respondent's challenge to Arkansas prison conditions was in the Arkansas courts; and the order was very much at odds with principles set forth in this Court's decisions governing judicial proceedings in extradition cases.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Sheriff of El Dorado County, Cal., applies for a stay of an order of the Supreme Court of California issued April 9, 1980. The order was made in connection with a request for extradition of respondent Walker by the demanding State of Arkansas to the rendering State of California pursuant to the Extradition Clause of the Constitution and federal statutes implementing it. The stay is requested pending consideration by this Court of a petition for certiorari to review the order, which is sufficiently short to permit its pertinent parts to be set forth *in haec verba*:

> "The Sheriff of the County of El Dorado is ordered to show cause before the Superior Court of El Dorado County with directions to that court to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance

with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits.

"Pending final determination of this proceeding execution of the Governor's Warrant of Extradition is stayed, and the Sheriff of the County of El Dorado is directed not to release petitioner into the custody of any agent of the State of Arkansas."

Though there are numerous factual allegations in both the application and in the response for which I called, the only one which is verified was made to Governor Brown of California in urging him to refuse to issue an extradition warrant in this case. In that affidavit, a practicing attorney in Little Rock, Ark., stated: "I have no hesitation in stating that I fear if James Dean Walker is returned to the Arkansas penitentiary system that he faces grave danger to his physical well being."

Nonetheless, on February 18, 1980, the Governor of California honored the requisition for the arrest and rendition of respondent James Dean Walker, who was then within the State of California and who escaped from an Arkansas prison prior to completing a sentence imposed upon him in that State following his conviction for murder. The legal issues posed by the applicant's request for a stay can probably be best understood in the light of the legal proceedings which have ensued since Governor Brown issued the warrant of arrest and rendition.

Respondent Walker first challenged his extradition by filing a petition for a writ of habeas corpus in the Superior Court of El Dorado County, Cal., then in the California Court of Appeal, Third Appellate District, and then in the United States District Court for the Eastern District of California. Each of these efforts was unsuccessful.

It was only upon this final application to the Supreme Court of California that he obtained the relief which he sought, and the Sheriff of El Dorado County who is his

present custodian is now the applicant before me. Thus the executive aspect of extradition, and the legal obligation of the Governor of one State to surrender a fugitive found in that State to the Governor of a demanding State upon his request discussed in *Kentucky* v. *Dennison*, 24 How. 66 (1861), are not involved here. The Governor of California has already issued an extradition warrant in response to the request of the Governor of Arkansas, and the question is to what extent may the courts of the so-called "asylum" or "rendering" State inquire beyond the face of the extradition warrant and its conformity to state law.

This Court most recently considered that question in *Michigan* v. *Doran*, 439 U. S. 282 (1978), in which it stated that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, § 2, cl. 2, of the Constitution." *Id.*, at 288. We further stated in that case:

> "Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." *Id.*, at 289.

In an earlier decision, *Sweeney* v. *Woodall*, 344 U. S. 86 (1952), the Court stated:

> "The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system." *Id.*, at 89–90 (footnotes omitted).

In this case, the demanding State is Arkansas, whose prisons were the subject of our opinion in *Hutto* v. *Finney*, 437 U. S. 678 (1978). The asylum State is California, and the Superior Court of El Dorado County, Cal., has been ordered by the Supreme Court of that State "to conduct hearings to determine if the penitentiary in which Arkansas seeks to confine petitioner is presently operated in conformance with the Eighth Amendment of the United States Constitution and thereafter decide the petition on its merits."

The 1970 census conducted by the United States indicates that El Dorado County, Cal., has a population of 43,833 persons. Its county seat, Placerville, with a population indicated by the same census as being in the neighborhood of 5,000 persons, is located between Sacramento and the Nevada border on the south side of Lake Tahoe. While there is in terms no doctrine of *"forum non conveniens,"* the doctrines of this Court in *Sweeney* v. *Woodall*, *supra*, and *Michigan* v. *Doran*, *supra*, indicate that the interstate rendition of fugitives has a federal constitutional and statutory basis, and cannot be decided solely in accordance with the principles of law enunciated by the courts of one State. Here the Governor of California has granted the request for extradition, which is in compliance with federal standards. And under *Sweeney* the proper forum for respondent's challenge to Arkansas prison conditions is in the Arkansas courts. It seems to me that the order issued by the Supreme Court of California is very much at odds with principles set forth in *Doran* and *Sweeney*, and I have therefore decided to grant the application of applicant Pacileo for a stay pending timely filing of a writ of certiorari in this Court to review the order of the Supreme Court of California. In the event that the petition is denied, the stay issued by me shall expire of its own force. In the event that the petition for certiorari is granted, the stay shall continue in force until final disposition of the case by this Court or further order of the Court.

BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* CALDWELL ET AL.

ON APPLICATION FOR STAY

No. A-946. Decided May 6, 1980

Application by the Commissioner of the New York Department of Social Services to stay, pending the filing and disposition of a petition for certiorari, the Court of Appeals' mandate affirming the District Court's preliminary injunction against enforcement of a New York statute limiting eligibility for Medicaid assistance to those medically needy persons who have not made a voluntary transfer of property for the purpose of qualifying for such assistance within 18 months prior to applying for Medicaid, is denied. Applicant has not satisfied her burden of showing, with respect to the risk of irreparable harm, that the balance of equities favors her as against respondent aged, blind, and disabled persons who were denied Medicaid under New York's "no transfer" rule, nor has she met her burden of showing that four Members of this Court would vote to grant certiorari.

MR. JUSTICE MARSHALL, Circuit Justice.

Applicant Barbara Blum, the Commissioner of the New York State Department of Social Services, seeks a stay of the mandate of the United States Court of Appeals for the Second Circuit pending filing and disposition of her petition for a writ of certiorari. The mandate of the Court of Appeals will issue on May 7, 1980, and that court has denied a motion for a stay. This application for a stay was filed on May 5, 1980. Oral argument was heard in chambers. For the reasons that follow, I deny the application for a stay.

I

This case involves medical assistance to the needy pursuant to the Medicaid program. Subchapter XIX of the Social Security Act, 42 U. S. C. §§ 1396–1396k, establishes the fed-

eral statutory guidelines which govern plans for medical assistance if a State chooses to participate in the Medicaid program. Any State which participates in Medicaid must extend medical benefits to all persons receiving supplemental security income (SSI) benefits under Subchapter XVI (Supplemental Security Income for the Aged, Blind, and Disabled), see 42 U. S. C. § 1396a (a)(10)(A). Such persons are known as the "categorically needy." The State may also provide medical assistance under Medicaid for persons "who would, except for income and resources, be eligible . . . to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services," 42 U. S. C. § 1396a (a)(10)(C)(i). Such persons are known as the "medically needy."

New York opted to participate in the Medicaid program and to provide Medicaid payments to the medically needy as well as the categorically needy. The State has imposed an eligibility requirement for those persons seeking to qualify as medically needy. New York Soc. Serv. Law § 366.1 (e) (McKinney Supp. 1979) limits eligibility to those persons who have not made "a voluntary transfer of property (i) for the purpose of qualifying for such [medical] assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance." A transfer of property within 18 months prior to application for Medicaid is presumed to have been for the purpose of qualifying for medical assistance. Any such transfer results in the denial of Medicaid benefits. See also 18 N. Y. C. R. R. § 360.8 (1979). No such "no-transfer" rule applies to the categorically needy, since an applicant is allowed

to transfer property in order to qualify for SSI benefits. See 42 U. S. C. § 1382b (b).

Respondents are aged, blind, or disabled persons who would be eligible for SSI benefits but for their income and resources and who have been denied medical assistance benefits for the medically needy because they voluntarily transferred property prior to application for such benefits or while receiving such benefits. They filed suit in the Federal District Court for the Northern District of New York pursuant to 42 U. S. C. § 1983 to challenge N. Y. Soc. Serv. Law § 366.1 (e) (McKinney Supp. 1979) and 18 N. Y. C. R. R. § 360.8 as violative of due process, equal protection, and the Supremacy Clause. The District Court found jurisdiction under 28 U. S. C. § 1343 (3). The suit was certified by the District Court as a class action on behalf of all aged, blind, or disabled persons who have been denied or will in the future be denied medical assistance benefits for the medically needy in New York State on the basis of a transfer of assets in violation of Soc. Serv. Law § 366.1 (e) and 18 N. Y. C. R. R. § 360.8.

The District Court granted respondents' motion for a preliminary injunction. The court concluded first that there had been a sufficient showing by respondents of likelihood of success on the merits. The Social Security Act provides that if the State chooses to provide benefits to the medically needy, the State must make such assistance available to all persons who would, except for income and resources, be eligible for SSI benefits "and who have insufficient (as determined in accordance with *comparable* standards) income and resources to meet the costs of necessary medical and remedial care and services." 42 U. S. C. § 1396a (a)(10)(C)(i) (emphasis supplied). The Department of Health, Education, and Welfare (HEW) in its accompanying regulation has provided that a state agency "must not use requirements for determining eligibility [for Medicaid benefits] for optional coverage groups [such as the medically needy] that are . . .

(2) For aged, blind and disabled individuals, more restrictive than those used under SSI. . . ." 42 CFR § 435.401 (c) (1979). Since under SSI an applicant may transfer assets voluntarily in order to become eligible, the District Court concluded that the more restrictive no-transfer rule of New York for the medically needy was in "apparent" conflict with federal law. The court noted that HEW officials had notified New York that its no-transfer rule violated federal requirements. The court therefore found that the respondents' likelihood of success was "strong." The District Court also concluded that the balance of harms weighed in favor of granting the injunction, because "the very survival of these individuals and those class members in similar situations is threatened by a denial of medical assistance benefits during the pendency of these actions."

The preliminary injunction was entered by the District Court on December 3, 1979. Pursuant to a stipulation by the parties, the Court of Appeals entered a temporary stay of the injunction on January 3, 1980. On April 16, 1980, the Court of Appeals affirmed the grant of the preliminary injunction, "substantially for the reasons stated by Judge Munson." The Court of Appeals noted that the only other Court of Appeals to address this issue reached the same result, see *Fabula* v. *Buck*, 598 F. 2d 869 (CA4 1979) (Maryland no-transfer rule). The New York Supreme Court, Appellate Division, has also found that Soc. Serv. Law § 366.1 (e) conflicts with the Social Security Act and therefore violates the Supremacy Clause, see *Scarpuzza* v. *Blum*, 73 App. Div. 2d 237, 426 N. Y. S. 2d 505 (1980). The Court of Appeals also noted that Congress is considering legislation to authorize States to impose a no-transfer rule for Medicaid benefits, which suggests that such a rule is not presently allowed. The Court of Appeals agreed with the District Court that the "balance of hardships . . . would tip decidedly toward [respondents] if relief were denied." The court also vacated its stay.

On April 30, 1980, the Court of Appeals denied a motion for a stay of the mandate pending filing of a petition for writ of certiorari.

II

Applicant states in her motion papers that she will argue in her petition for certiorari that Congress has not expressed any intention to pre-empt state no-transfer rules. Applicant will also argue that HEW regulation 42 CFR § 435.401 (c) (1979), interpreting the Social Security Act to prohibit the New York no-transfer rule, is beyond the authority of the agency.

The criteria for determining whether to grant a stay pending the filing and disposition of a petition for writ of certiorari are well established. First, the Circuit Justice must balance the equities to determine on which side the risk of irreparable harm weighs most heavily. *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1308–1309 (1973) (MARSHALL, J., in chambers); *Beame* v. *Friends of the Earth*, 434 U. S. 1310, 1312 (1977) (MARSHALL, J., in chambers). Second, if the balance of equities favors the applicant, the Circuit Justice must determine whether it is likely that four Members of this Court would vote to grant a writ of certiorari. *Holtzman* v. *Schlesinger, supra*, at 1310; *Beame* v. *Friends of the Earth, supra*, at 1312. The burden of persuasion on both these issues is on the applicant, *ibid.* That burden is particularly heavy here since the Court of Appeals has vacated its original stay and denied the motion for a new stay. Cf. *ibid.* (stay denied by District Court and Court of Appeals).

The applicant has not satisfied her burden in this case. Blum contends that compliance with the preliminary injunction will cost the State of New York "millions" of dollars. At oral argument on this application counsel for applicant estimated that the State will have to expend an additional $150 million per year in Medicaid benefits as a result of the deci-

sion below, but the economic harm to be considered on this stay application is only the additional expenditure during the time in which the petition for certiorari is pending. Such harm must be considerably less than $150 million.* On the other side of the balance are the life and health of the members of this class: persons who are aged, blind, or disabled and unable to provide for necessary medical care because of lack of resources. The District Court noted that some of the members of the class have already died since this suit was filed, and the denial of necessary medical benefits during the months pending filing and disposition of a petition for writ of certiorari could well result in the death or serious medical injury of members of this class. The balance of equities therefore weighs in favor of the respondents.

In addition, Blum has failed to carry her burden of showing that four Members of this Court would be likely to vote to grant a writ of certiorari. There is no conflict in the courts of appeals, but rather uniformity of decision in the two Circuits which have addressed the issue. The intermediate appellate court in New York is also in agreement with the decision below. The terms of the Social Security Act support the judgment of the Court of Appeals, and the agency responsible for administering the Act is in complete accord

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*New York entered into an agreement with HEW in 1973 whereby the Secretary of HEW determines the eligibility for medical assistance benefits of persons who are also eligible for SSI benefits. This eliminates the need for a separate medical assistance application and eligibility determination by New York State. Blum has notified the Secretary of HEW that New York will terminate the agreement in 120 days, as provided by the agreement, because of HEW's determination that the New York no-transfer rule violates federal eligibility requirements. Applicant cites the added administrative costs to New York of having to establish an eligibility agency of its own as an additional harm to be weighed in the balance on this stay application. The cancellation of the agreement, however, is a voluntary act by Blum, and the added burdens of that voluntary act should not weigh in the balance of equities here.

with the decision below. Finally, Congress is presently considering legislation to amend the Act on this very issue. Under the circumstances, it is not sufficiently likely that four Members of this Court would vote to grant a writ of certiorari to warrant issuing a stay of the mandate.

The application for a stay is denied.

BARNSTONE *v.* UNIVERSITY OF HOUSTON ET AL.

ON APPLICATION TO VACATE ORDER

No. A-978. Decided May 12, 1980

Application to vacate the Court of Appeals' order vacating, on a specified condition, the District Court's order compelling respondents to broadcase a certain television program, is denied.

MR. JUSTICE POWELL, Circuit Justice.

On May 9, 1980, the District Court for the Southern District of Texas entered a temporary restraining order compelling respondents to broadcast "The Death of a Princess," a television program to be distributed by the Public Broadcasting Service, on May 12, 1980, at 8 p. m. Today, the Court of Appeals for the Fifth Circuit vacated the District Court order on condition that the respondents "tape and preserve the program in issue." Applicant seeks relief from the Court of Appeals order. The respondents oppose the application, and represent that "The Death of a Princess" will be preserved on videotape for later airing should the applicant obtain a permanent injunction. The Public Broadcasting Service has filed an *amicus* brief also asking that the application of the applicant be denied.

Although applicant requests that the Court grant certiorari and reverse the judgment of the Court of Appeals, in purpose and effect applicant is requesting that the order of that court be vacated, thereby reinstating the temporary restraining order of the District Court. Such a request normally comes to me as Circuit Justice. Although I may have considered referring this to the entire Court, a quorum is not present. I therefore exercise my authority as Circuit Justice to rule on applicant's application.

Upon consideration of the papers, I deny the application.

I have consulted informally with each of my Brethren who was present at the Court when these papers arrived late this

afternoon. Although no other Justice has participated in the drafting of this order, I am authorized to state that each of the three whom I consulted would vote to deny this application. Of course, this action should not be taken as expressing a view on the merits of the questions raised in this case. See *Graves* v. *Barnes*, 405 U. S. 1201, 1204 (1972) (POWELL, J., in chambers).

MARTEN ET UX. *v.* THIES, DIRECTOR OF COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, ET AL.

ON APPLICATION FOR STAY

No. A-972. Decided May 16, 1980

Application to stay California Court of Appeal's order declining to continue applicants' right to visit their prospective adoptive child, pending review by this Court, is denied. It appears unlikely that four Members of this Court would vote to grant plenary review, and the record amply supports the Court of Appeal's finding that further legal obstacles to the child's placement in another adoptive home would be to the child's detriment.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants Kelly Marten and Kathy Marten have asked me to stay an order of the California Court of Appeal declining to continue their right to visit their prospective adoptive daughter, Sarah, pending disposition of applicants' appeal or petition for a writ of certiorari to this Court. The Court of Appeal earlier had rejected applicants' appeal from an order of the Superior Court upholding the decision of the respondent placement agency to terminate applicants' status as Sarah's prospective adoptive parents. Because I do not believe that four Members of this Court will vote to hear applicants' ultimate appeal or petition, and because the Court of Appeal specifically found that further legal obstacles to Sarah's placement in another adoptive home would be to the child's detriment, I will deny the requested stay.

The historical facts in this case are not in dispute and may be gleaned from the application and the opinion of the California Court of Appeal. In early 1976, applicants, who are husband and wife, qualified as prospective adoptive parents with respondent San Bernadino County Adoption Services (the Agency). On May 17, 1977, Sarah, then 15 weeks

old, was placed in applicants' home on a "quasi-adoptive" basis pending final adoption at some later date. At that time, applicants agreed to inform the Agency of any change in their domestic circumstances.

Unbeknownst to the Agency, applicants had been experiencing marital problems even before they took custody of Sarah. These problems finally culminated in a separation in January 1978, when Kelly Marten left his wife and Sarah and moved in with another woman. Contrary to their original agreement, however, applicants did not inform the Agency of this change in circumstances. Applicants apparently remain separated as of this date.

In April 1978 the Agency learned of applicants' separation through a third party. The Agency sent first one and then another social worker to Kathy Marten's home to interview Ms. Marten and to assess Sarah's environment. The first advised applicants that removal of Sarah from their custody was a possibility, but that she would have to consult her superiors. The second social worker concluded that Ms. Marten's psychological state was deteriorating and recommended that Sarah be removed from applicants' home. Upon receiving these reports, the Agency's acting chief of adoptions and its director agreed that Sarah should be removed from Ms. Marten's custody and that the removal should take place without notice to applicants. This latter determination was based on their belief that notice would place Sarah in "imminent danger" because of the perceived likelihood that Ms. Marten would flee from the State with the child. On August 21, 1978, Sarah was, in fact, removed from Ms. Marten's custody without prior notice and was placed in a foster home.

Pursuant to applicable California law, applicants sought administrative review of the Agency's decision to terminate their status as Sarah's prospective adoptive parents. After a hearing, the "Review Agent" issued a decision upholding the Agency. He found, *inter alia*, that there had been substan-

tial cause to believe that Sarah was a child whose health and safety had been in jeopardy, that she had been in imminent danger, and that the jeopardy would have been greatly increased if prior notice of the removal had been given to applicants.

On applicants' petition to Superior Court for a writ of mandate, that court found that the conclusions of the Review Agent were amply supported by the record and that return of Sarah to applicants " 'would not be in the best interest of the child, and in fact would be detrimental to the child.' " 99 Cal. App. 3d 161, 167, 160 Cal. Rptr. 57, 60 (1979).

The Court of Appeal affirmed, rejecting each of the contentions that applicants claim they will advance in their appeal or petition to this Court. First, the appellate court concluded that, while preremoval notice to custodial "parents" in applicants' position was a normal requisite of procedural due process, California law specifically permitted removal without notice where "[t]he agency director has reasonable cause to believe the child is in imminent danger. . . ." 22 Cal. Admin. Code § 30684 (d)(1)(A) (1976). Here, according to the Court of Appeal, substantial evidence supported a finding that Ms. Marten might flee if notified and that such flight would endanger the child. In particular, the Court of Appeal cited

> "(1) the husband and wife's concealment of their marital differences in order to obtain the adoptive placement; (2) their failure to report their separation as required by their agreement with the Agency; (3) the wife's previous conduct in taking the child to an unauthorized destination out of the state; (4) the wife's emotional instability and over-dependence on the child for her emotional needs; (5) insensitivity of both husband and wife to the child's emotional and developmental needs; and (6) the fact that the fear of losing the child had been the stated reason for their untruthfulness and subterfuge." 99 Cal. App. 3d, at 172, 160 Cal. Rptr., at 63.

Second, the Court of Appeal confronted applicants' contention that their marital separation should not disqualify them "*a fortiori*" from adopting Sarah. According to the court, however, applicants' separation was only one factor in the Agency's decision to terminate their status as prospective adoptive parents. Other important considerations included "emotional stability of the parents, parental sensitivity to the child's developmental needs, trustworthiness of the parents and their willingness to abide by the rules, maturity of the parents, motivation to correct deficiencies, and economic security." *Id.*, at 173, 160 Cal. Rptr., at 64. Looking to the record, the appellate court concluded that all these considerations supported the Agency's decision.

Finally, the Court of Appeal rejected applicants' claim, raised for the first time in their reply brief to that court, that the Review Agent should have appointed independent counsel to represent Sarah at the administrative hearing. Overlooking the belated nature of this argument, the court found no evidence of any divergence of interest between the Agency and Sarah, and therefore no need "to further encumber the . . . placement procedure" by requiring provision of independent counsel. *Id.*, at 174, 160 Cal. Rptr., at 64.

Prior to their appeal to the Court of Appeal, applicants had been visiting Sarah twice a week at her foster home pursuant to an agreement reached with the Agency. During its consideration of applicants' case, the Court of Appeal entered an order permitting applicants to continue their visits. When that court entered its judgment, however, it specifically vacated that order, noting that applicants had "already delayed the child's placement in a proper adoptive home by several months, to the child's detriment," and that "[f]urther legal maneuvers to perpetuate a relationship initiated by their own wrongful act should not be tolerated." *Id.*, at 175, 160 Cal. Rptr., at 64. After the Supreme Court of California declined to hear applicants' appeal, the Court of Appeal denied applicants' motion to recall its mandate and to

grant them continued visitation rights pending appeal or petition to this Court. It is this last order that applicants would have me stay so as to grant them the visitation rights terminated by the court below.

Applicants state that in their ultimate appeal or petition to this Court they will raise each of the three aforementioned contentions rejected by the Court of Appeal. I find it highly unlikely that four Members of this Court would vote to grant plenary review on any of these issues.

In regard to applicants' claim that they were entitled as a matter of procedural due process to preremoval notice, I would note initially that such a claim depends entirely upon their ability to show that they have been deprived of some protected interest in life, liberty, or property. As I read this Court's opinion in *Smith* v. *Organization of Foster Families*, 431 U. S. 816, 842–847 (1977), their success on this threshold issue is far from certain. See also *id.*, at 856–863 (STEWART, J., concurring in judgment). Even assuming such success, however, applicants candidly, and somewhat cryptically, pose the primary issue presented to this Court as whether authorities can dispense with preremoval notice on a finding of "'prospective' imminent danger" to the child as opposed to "actual imminent danger." Statement of Points and Authorities 7. Like the court below, I find this distinction somewhat elusive. In any event, I am reasonably certain that, given the uniform conclusion of the agencies and courts below that there was indeed an imminent danger to Sarah, four of my colleagues would not vote to examine that conclusion.

As for applicants' contention that they were disqualified as prospective adoptive parents "merely" because they had separated, I note only that this contention finds no support in the decision of the Court of Appeal or in any of the documents filed in support of the application.

Finally, applicants reassert their contention that Sarah was entitled to independent counsel in the administrative proceeding. Absent a showing of actual conflict or other

prejudice to Sarah, however, I see little chance that this argument will receive plenary review.

Applicants argue doggedly that the equities in this case favor continuation of their visitation privileges pending disposition of their case by this Court. They rely in particular upon affidavits by various child psychologists indicating that such visits would not harm Sarah and actually would assist her in overcoming the trauma of removal from applicants' home. The Court of Appeal also was presented with these affidavits, however, and concluded on the basis of all the evidence that further visitation would not be in Sarah's best interest. In a passage I consider quite telling, that court stated:

> "The concealment of [applicants'] marital difficulties and [their] failure to report their separation suggests that the initial placement may have been sought in an effort to salvage a failing marriage. It is unfortunate when natural parents resort to such practices; to permit adoption to be used for such purpose would be a serious breach of duty on the part of the Agency." 99 Cal. App. 3d, at 173, 160 Cal. Rptr., at 64.

Removed as I am from the actual events at issue by nearly 3,000 miles and by several layers of judicial proceedings, I decline to make my own assessment of Sarah's best interests and instead defer to the amply supported conclusions of the courts below.

The application is accordingly

Denied.

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JUDGES. See **Civil Rights Act of 1871, 2.**

JUDGMENTS. See **Causes of Action; Federal Rules of Civil Procedure, 2.**

JUDICIAL REVIEW.

Clean Air Act—Final actions of EPA Administrator.—Under provisions of § 307 (b)(1) of Clean Air Act whereby direct review is provided in courts of appeals for certain specified actions taken by Administrator of Environmental Protection Agency and for "any other final action" of Administrator under Act that is locally or regionally applicable, Court of Appeals has jurisdiction of respondent's petition to review EPA's decision

JUDICIAL REVIEW—Continued.

that certain equipment at respondent's power generating facility was subject to certain "new source" performance standards regarding air pollution. Harrison v. PPG Industries, Inc., p. 578.

JURISDICTION. See also **Judicial Review.**

Diversity of citizenship—Trustees of business trust.—Individual trustees of a business trust organized under Massachusetts law, who possess certain customary powers to hold, manage, and dispose of assets for the benefit of others, may invoke diversity jurisdiction of federal courts on basis of their own citizenship without regard to citizenship of trust beneficiaries. Navarro Savings Assn. v. Lee, p. 458.

LABOR DEPARTMENT. See **Constitutional Law,** II, 1.

LAND CLAIMS. See **Mineral Leasing Act.**

LEGAL SERVICES DIRECTORY. See **Civil Rights Act of 1871,** 2.

LEGISLATIVE IMMUNITY. See **Civil Rights Act of 1871,** 2.

LIBERTY INTERESTS. See **Constitutional Law,** IV, 1; **Habeas Corpus,** 1.

LICENSES. See **Limitation of Actions,** 2.

LIMITATION OF ACTIONS.

1. *Diversity action—Oklahoma statute of limitations—Effect of Federal Rule of Civil Procedure 3.*—Diversity action was barred by Oklahoma statute of limitations requiring action to be filed within two years and providing that action was not "commenced" until service of summons, which could occur outside limitations period if service was made within 60 days of filing of complaint within period, where petitioner filed complaint within 2-year period but did not effectuate service until after such period and 60-day service period had expired, and Federal Rule of Civil Procedure 3, which provides that a civil action is commenced by filing complaint, did not control. Walker v. Armco Steel Corp., p. 740.

2. *Federal-court action—Applicability of state law.*—Respondent's federal-court action under 42 U. S. C. § 1983—alleging that petitioner Board's refusal to grant her a hearing before denying her application for a waiver of New York chiropractors' licensing examination requirements violated Fourteenth Amendment—was barred by New York's statute of limitations, federal court being obligated to apply not only New York's statute but also its rule whereby limitations period was not tolled during pendency of respondent's state-court action attacking Board's decision but not raising any constitutional challenge thereto. Board of Regents v. Tomanio, p. 478.

LIMITATION OF LIABILITY. See **Employee Retirement Income Security Act of 1974.**

LONGSHOREMEN. See **Causes of Action.**

LOSS OF SOCIETY. See **Causes of Action.**

LOUISIANA. See **Federal-State Relations.**

MANIPULATION OR DECEPTION IN SECURITIES TRANSACTIONS. See **Securities Regulation.**

MARITIME LAW. See **Causes of Action.**

MASSACHUSETTS. See **Jurisdiction.**

MEDICAID. See **Stays, 4.**

MINERAL LEASES. See **Federal-State Relations.**

MINERAL LEASING ACT.

Oil shale lands—Patentability.—Under Act's savings clause, which exempts valid claims to oil shale existent at date of Act's passage in 1920 from Act's withdrawal of oil shale from general mining law, oil shale claims located before 1920 are patentable "valuable mineral deposits" even though at time such claims were located, oil shale operations were not commercially feasible. Andrus v. Shell Oil Co., p. 657.

MIRANDA RIGHTS. See **Constitutional Law, V.**

MISDEMEANORS. See **Criminal Law.**

MISSOURI. See **Constitutional Law, III, 3.**

MOBILE, ALA. See **Constitutional Law, III, 2.**

MULTIPLE REPRESENTATION OF CRIMINAL DEFENDANTS. See **Habeas Corpus, 2, 3.**

MUNICIPAL ELECTIONS. See **Constitutional Law, III, 2; VI; Voting Rights Act of 1965.**

MURDER. See **Constitutional Law, II, 2.**

"NEW SOURCE" POLLUTION STANDARDS. See **Judicial Review.**

NEW TRIALS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

NEW YORK. See **Causes of Action; Limitation of Actions, 2; Stays, 4.**

NINTH AMENDMENT. See **Constitutional Law, VI.**

"NONFORFEITABLE" PENSION BENEFITS. See **Employee Retirement Income Security Act of 1974.**

OIL SHALE LANDS. See **Mineral Leasing Act; Taylor Grazing Act.**

OKLAHOMA. See **Limitation of Actions, 1.**

ORIGINAL PROCEEDINGS. See **Federal-State Relations.**

OUTER CONTINENTAL SHELF LANDS ACT. See **Federal-State Relations.**

OWNERSHIP OF TIDELANDS. See **Federal-State Relations.**

PARENT AND CHILD. See **Stays, 1.**

PARTIES. See **Jurisdiction.**

PATENTS TO LANDS. See **Mineral Leasing Act.**

"PATTERN OR PRACTICE" OF DISCRIMINATION. See **Civil Rights Act of 1964.**

PENSION BENEFIT GUARANTY CORPORATION. See **Employee Retirement Income Security Act of 1974.**

PENSION PLANS. See **Employee Retirement Income Security Act of 1974.**

PER SE ANTITRUST VIOLATIONS. See **Antitrust Acts.**

PHOTOGRAPHIC IDENTIFICATIONS. See **Stays, 5.**

PLEADING. See **Civil Rights Act of 1871, 1.**

POLICE INTERROGATIONS. See **Constitutional Law, IV, 1; V.**

POLLUTION. See **Judicial Review.**

PRELIMINARY INJUNCTIONS. See **Stays, 4.**

PRETRIAL IDENTIFICATIONS. See **Stays, 5.**

"PREVAILING PARTY." See **Civil Rights Attorney's Fees Awards Act of 1976.**

PRICE FIXING. See **Antitrust Acts.**

PRISONS AND PRISONERS. See **Constitutional Law, I; Stays, 2.**

PRIVACY. See **Constitutional Law, IV, 1.**

PRIVATE PENSION PLANS. See **Employee Retirement Income Security Act of 1974.**

PROCUREMENT CONTRACTS. See **Indians.**

PRODUCTS OF INDIAN INDUSTRY. See **Indians.**

PROFESSIONAL ADVERTISING. See **Civil Rights Act of 1871, 2.**

PROPORTIONAL REPRESENTATION. See **Constitutional Law, III, 2.**

PROSPECTIVE ADOPTIVE PARENTS. See **Stays, 1.**

PUBLIC CONTRACTS. See **Indians.**

PUBLIC LANDS. See **Mineral Leasing Act; Taylor Grazing Act.**

PUBLIC OFFICERS AND EMPLOYEES. See **Civil Rights Act of 1871; Constitutional Law, I; II, 1.**

PUERTO RICO. See **Civil Rights Act of 1871; Constitutional Law, III, 1.**

PUNITIVE DAMAGES. See **Constitutional Law, I.**

QUALIFIED IMMUNITY OF PUBLIC OFFICIALS FROM LIABILITY. See **Civil Rights Act of 1871, 1.**

RACIAL DISCRIMINATION. See **Constitutional Law, III, 2; VI; Voting Rights Act of 1965.**

REAL PARTIES IN INTEREST. See **Jurisdiction.**

RECIDIVIST STATUTES. See **Criminal Law.**

REGULATIONS OF ATTORNEY GENERAL. See **Voting Rights Act of 1965, 3.**

RESTRAINING ORDERS. See **Stays, 3.**

RETAINED COUNSEL. See **Habeas Corpus.**

REVIEW OF AGENCY ACTIONS. See **Judicial Review.**

RIGHT TO COUNSEL. See **Constitutional Law, V; Criminal Law; Habeas Corpus.**

RIGHT TO FAIR TRIAL. See **Habeas Corpus, 2.**

RIGHT TO REMAIN SILENT. See **Constitutional Law, V.**

ROAD CONSTRUCTION CONTRACTS. See **Indians.**

ROME, GA. See **Constitutional Law, VI; Voting Rights Act of 1965.**

RULE OF REASON. See **Antitrust Acts.**

RULES OF CIVIL PROCEDURE. See **Civil Rights Act of 1964; Federal Rules of Civil Procedure; Limitation of Actions, 1.**

RULES OF SECURITIES AND EXCHANGE COMMISSION. See **Securities Regulation.**

SCHOOL LAND GRANTS. See **Taylor Grazing Act.**

SCIENTER. See **Securities Regulation.**

SEARCHES AND SEIZURES. See **Constitutional Law, IV.**

SECRETARY OF THE INTERIOR. See **Indians; Taylor Grazing Act.**

SECURITIES ACT OF 1933. See **Securities Regulation.**

SECURITIES AND EXCHANGE COMMISSION. See **Securities Regulation.**

SECURITIES EXCHANGE ACT OF 1934. See **Securities Regulation.**

SECURITIES REGULATION.

Injunctions against violations of federal Acts—Necessity of showing scienter.—Securities and Exchange Commission must establish scienter as an element of civil actions to enjoin violations of proscriptions of § 10 (b) of Securities Exchange Act of 1934, Commission's Rule 10b–5, and § 17 (a) (1) of Securities Act of 1933 against use of device, scheme, or artifice to defraud, but need not establish scienter as to violations of proscriptions of §§ 17 (a) (2) and (3) of 1933 Act against obtaining money by use of untrue statement of, or omission to state, material fact, or engaging in practice which operates or would operate as a fraud or deceit upon purchaser. Aaron v. SEC, p. 680.

SELF-INCRIMINATION. See **Constitutional Law, V.**

SENTENCES. See also **Constitutional Law, II, 2; Criminal Law.**

Enhanced punishment for use of firearm.—Title 18 U. S. C. § 924 (c), which authorizes imposition of enhanced penalties on a defendant who uses a firearm while committing a federal felony, may not be applied to a defendant who uses a firearm in course of a felony that is proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used, and sentence received by such a defendant may be enhanced only under enhancement provision in statute defining felony. Busic v. United States, p. 398.

SETOFFS. See **Federal Rules of Civil Procedure, 2.**

SEVERANCE TAXES ON MINERALS. See **Federal-State Relations.**

SEX DISCRIMINATION. See **Civil Rights Act of 1964; Constitutional Law, III, 3.**

SHERMAN ACT. See **Antitrust Acts.**

SHIPOWNERS. See **Causes of Action.**

SIXTH AMENDMENT. See **Criminal Law; Habeas Corpus.**

SOCIAL SECURITY ACT. See **Constitutional Law, III, 1; Stays, 4.**

STATE ACTION. See **Habeas Corpus, 1.**

STATUTES OF LIMITATIONS. See **Limitation of Actions.**

STAYS.

1. *Adoption—Order denying visitation rights.*—Application to stay California court's order declining to continue applicants' right to visit their prospective adoptive child, is denied. Marten v. Thies (REHNQUIST, J., in chambers), p. 1320.

2. *Extradition proceedings—Prison conditions.*—Application to stay California Supreme Court's order staying execution of Governor of California's

STAYS—Continued.

warrant for extradition of respondent to Arkansas and directing lower state court to conduct hearings to determine if Arkansas prison was operated in conformance with Eighth Amendment, is granted. Pacileo v. Walker (REHNQUIST, J., in chambers), p. 1307.

3. *Order requiring broadcast of television program.*—Application to vacate Court of Appeals' order which vacated District Court's order compelling respondents to broadcast a certain television program, is denied. Barnstone v. University of Houston (POWELL, J., in chambers), p. 1318.

4. *Preliminary injunction—Medicaid.*—Application to stay Court of Appeals' mandate affirming District Court's preliminary injunction against enforcement of New York statute limiting eligibility for Medicaid assistance to those medically needy persons who have not made a voluntary transfer of property in order to qualify for such assistance within 18 months prior to applying for Medicaid, is denied. Blum v. Caldwell (MARSHALL, J., in chambers), p. 1311.

5. *Retrial of murder charge.*—Application to stay Court of Appeals' mandate under which a writ of habeas corpus would issue unless California granted respondent a new trial on a murder charge, is granted. Sumner v. Mata (REHNQUIST, J., in chambers), p. 1302.

STRIP-SEARCHES. See **Constitutional Law**, IV, 1.

SUBMERGED LANDS. See **Federal-State Relations.**

SUPPRESSION OF EVIDENCE. See **Constitutional Law**, IV; V.

SUPREME COURT. See also **Federal-State Relations.**

1. Amendments to Federal Rules of Civil Procedure, p. 995.
2. Appointment of Alexander L. Stevas as Chief Deputy Clerk, p. 930.

SURVIVAL OF ACTIONS. See **Constitutional Law**, I.

TAXES. See **Federal-State Relations.**

TAYLOR GRAZING ACT.

School land grants to States—Selection of indemnity lands.—Under § 7 of Act, Secretary of Interior has authority, in his discretion, to classify land within a federal grazing district as proper for selection by a State as indemnification for original school land grants that were lost through federal pre-emption or private entry prior to survey, and his policy of denying indemnity applications involving grossly disparate land values is a lawful exercise of his discretion, affording a valid ground for his refusal to accept Utah's selection of valuable oil shale lands as indemnification for original school land grants of significantly lesser value. Andrus v. Utah, p. 500.

TELEVISION BROADCASTING. See **Stays**, 3.

TEMPORARY RESTRAINING ORDERS. See **Stays**, 3.

TENTH AMENDMENT. See **Constitutional Law**, VI.

TERRITORY CLAUSE. See **Constitutional Law**, III, 1.

TOLLING LIMITATIONS PERIOD. See **Limitation of Actions.**

TRUSTEES. See **Jurisdiction.**

UNCOUNSELED CONVICTION AS BASIS FOR ENHANCED PENALTY. See **Criminal Law.**

UNLAWFUL EMPLOYMENT PRACTICES. See **Civil Rights Act of 1964**; **Constitutional Law**, II, 1.

UNSEAWORTHINESS. See **Causes of Action.**

UTAH. See **Taylor Grazing Act.**

VAGUENESS. See **Constitutional Law**, II, 2.

VALUABLE MINERAL DEPOSITS. See **Mineral Leasing Act.**

VESTED PENSION BENEFITS. See **Employee Retirement Income Security Act of 1974.**

VIRGINIA. See **Civil Rights Act of 1871**, 2.

VISITATION RIGHTS OF PROSPECTIVE ADOPTIVE PARENTS. See **Stays**, 1.

VOLUNTARINESS OF CONSENT TO SEARCH. See **Constitutional Law**, IV, 1.

VOTING RIGHTS ACT OF 1965. See also **Constitutional Law**, VI.

1. *"Bailout" procedures—Covered city.*—City which comes within Act only because it is part of a covered State may not use "bailout" procedures of § 4 (a) to withdraw from Act's coverage and escape § 5's preclearance requirements for voting-practice changes; any "bailout" action to exempt city must be filed by, and seek to exempt all of, State. City of Rome v. United States, p. 156.

2. *Refusal to preclear electoral changes—Discriminatory effect—District Court findings.*—In an action involving Attorney General's refusal under Act to preclear certain annexations by covered city and certain changes in city's system for election of Commission and Board of Education, District Court's findings that city failed to prove that electoral changes and annexations disapproved by Attorney General did not have a discriminatory effect were not clearly erroneous. City of Rome v. United States, p. 156.

3. *Refusal to preclear electoral changes—Request for reconsideration—Attorney General's regulation.*—Sixty-day period under Attorney General's regulation requiring requests for reconsideration of his refusal to preclear electoral changes to be decided within 60 days of their receipt, commences

VOTING RIGHTS ACT OF 1965—Continued.
anew when submitting jurisdiction deems its initial submission on a reconsideration motion to be inadequate and decides to supplement it. City of Rome v. United States, p. 156.

WAIVER OF LICENSING REQUIREMENTS. See **Limitation of Actions**, 2.

WAIVER OF MIRANDA RIGHTS. See **Constitutional Law**, V.

WARRANTS FOR EXTRADITION. See **Stays**, 2.

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WHOLESALERS. See **Antitrust Acts.**

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WIFE'S CLAIM FOR LOSS OF SOCIETY. See **Causes of Action.**

WITNESSES. See **Constitutional Law**, IV, 2.

WORDS AND PHRASES.

1. *"Any other final action."* § 307 (b)(1), Clean Air Act, 42 U. S. C. § 7607 (b)(1) (1976 ed., Supp. II). Harrison v. PPG Industries, Inc., p. 578.

2. *"Device, scheme, or artifice to defraud."* § 17 (a)(1), Securities Act of 1933, 15 U. S. C. § 77q (a)(1). Aaron v. SEC, p. 680.

3. *"Does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."* § 5, Voting Rights Act of 1965, 42 U. S. C. § 1973c. City of Rome v. United States, p. 156.

4. *"Manipulative or deceptive device or contrivance."* § 10 (b), Securities Exchange Act of 1934, 15 U. S. C. § 78j (b). Aaron v. SEC, p. 680.

5. *"Nonforfeitable benefits."* § 4022 (a), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1322 (a). Nachman Corp. v. Pension Benefit Guaranty Corporation, p. 359.

6. *"Otherwise authorized by law."* § 302 (c)(15), Federal Property and Administrative Services Act of 1949, 41 U. S. C. § 252 (c)(15). Andrus v. Glover Construction Co., p. 608.

7. *"Prevailing party."* Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. Hanrahan v. Hampton, p. 754.

8. *"Products of Indian industry."* Buy Indian Act, 25 U. S. C. § 47. Andrus v. Glover Construction Co., p. 608.

9. *"Transaction, practice, or course of business which operates or would operate as a fraud or deceit."* § 17 (a)(3), Securities Act of 1933, 15 U. S. C. § 77q (a)(3). Aaron v. SEC, p. 680.

WORDS AND PHRASES—Continued.

10. *"Untrue statement of a material fact or omission to state a material fact."* § 17 (a)(2), Securities Act of 1933, 15 U. S. C. § 77q (a)(2). Aaron v. SEC, p. 680.

WORKERS' COMPENSATION. See **Constitutional Law, III, 3.**

WRONGFUL DEATH. See **Causes of Action; Constitutional Law, I.**

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